

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 March 2023

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

Decision (including any steps ordered)

1. The Commissioner's decision is that a request about a BBC 'Panorama' documentary that the complainant submitted to the Financial Conduct Authority (FCA) can be categorised as a vexatious request under section 14(1) of FOIA. The FCA is not obliged to comply with the request, and it is not necessary for the FCA to take any steps.

Request and response

2. On 13 September 2022 the complainant submitted the following request for information to the FCA:

"Please provide me with all internal and external communications sent or received by the FCA and meeting agendas, collateral and minutes generated in connection with the above programme, between 1 March 2022 and 18 August 2022.

The disclosed information should include, but not be limited to:

- discussion about how to respond to the production team
- dialogue with the production team
- discussion of how to position the matter internally and with external stakeholders such as politicians and other media"

3. The FCA's final position was to refuse the request under section 14(1) of FOIA.

Reasons for decision

4. This reasoning covers whether FCA is entitled to rely on section 14(1) of FOIA to refuse the complainant's requests.
5. Under section 14(1) of FOIA a public authority is not obliged to comply with a request for information if the request is vexatious.
6. Broadly, vexatiousness involves consideration of whether a request is likely to cause a disproportionate or unjustified level of disruption, irritation, or distress.
7. To analyse vexatiousness, the Commissioner considers four broad themes that the Upper Tribunal (UT) developed in **Information Commissioner vs Devon County Council & Dransfield [2012] UKUT 440 (ACC)**:
 - Value or serious purpose
 - Motive
 - Burden; and
 - Harassment to staff
8. The Commissioner will first look at the value of the requests as this is the main point in favour of the request not being vexatious. He will then look at the negative impacts of the requests ie the three remaining themes of burden, motive, and harassment, before balancing the value of the requests against those negative impacts.
9. The Commissioner has considered the correspondence between the FCA and the complainant, the complaint and FCA's submission to him.
10. In its submission to the Commissioner the FCA has provided a background and context to the request. It says that the current request is a repeat of a request the complainant had submitted on 16 August 2022 on the same matter. In that earlier case, FCA had estimated that responding to the whole request would exceed the cost limit allowed under FOIA, and therefore the exemption under section 12 (cost of compliance exceeds appropriate limit) of FOIA applied.
11. The FCA had responded to the 16 August 2022 request on 13 September 2022. It stated that, "we have searched relevant mailboxes using the key terms 'BBC' and 'Panorama' which returned hundreds of emails which could relate to any BBC enquiry. A manual review of these emails would be required to ascertain whether they fall within the scope

of your request and if they relate to the specific Panorama episode. The title of the episode was decided shortly prior to the episode airing on television; therefore, the episode's title would have been an unsuitable search term."

12. The FCA also advised the complainant in its response to the earlier request that, "we anticipate that specifying a shorter period of time would assist your request to possibly fall within cost limit."
13. The FCA says that initially it appeared that the complainant, with their "repetitive" request of 13 September 2022, had sought to narrow the parameters of the requested information in terms of time frame (by reducing it from all results prior to 18 August 2022, to information between 1 March 2022 and 18 August 2022. However, the FCA says that in their request for an internal review of 6 November 2022 the complainant requested "all the files returned by the search terms 'BBC' and 'Panorama'" referred to in the FCA's 13 September 2022 response.
14. Therefore, the FCA considers the current request of 13 September 2022 and the internal review request of 6 November 2022 on the same matter effectively increase the burden placed on the FCA. As the scope of the information requested on 13 September 2022 is wider than in the 16 August 2022 request (because the complainant had broadened the scope of the request to "all" search returns), the FCA says it was reasonable for it to conclude in its internal review that the burden of complying with the current request would be substantially higher.
15. The FCA notes that the complainant suggested in their request for an internal review that providing them with all of those results, "would obviate the need for the FCA to undertake the manual review referred to in Annex B of its email of that date, thereby bringing the cost of complying far below the £450 cost threshold". The FCA explained in its internal review that the above reasoning is misconceived given FCA's legal duties such that providing the complainant with all the search results was not a viable option.
16. This is because, the FCA says, it has a duty to review the aforementioned search returns before releasing them to the world at large, not least for reasons of confidentiality under section 348 of the Financial Services and Markets Act 2000 ("FSMA"), personal data restrictions, and the possible applicability of any other potentially relevant exemptions under FOIA. If the FCA were to provide "all" the files to the complainant without reviewing them first, it is entirely possible, for example, that in doing so the FCA could inadvertently commit a criminal offence by disclosing information that is confidential under section 348 FSMA. FCA cannot know whether this would be the case unless and until it reviews each document. The same principle applies to the other exemptions under FOIA.

17. In its submission to the Commissioner, the FCA has gone on to first discuss the purpose of the request. It acknowledges that disclosing the information requested has a reasonable legitimate value of public interest. But in considering the ICO guidance on vexatious requests, it was the FCA's view that the legitimate value in this case was diminished by significant aggravating factors. As set out more fully below, the FCA believed that the value in the request was outweighed by the burden it imposed on the FCA, the apparent motive behind it, and the harassment and distress it caused.
18. The FCA has gone on to discuss the burden the request would place on it. The FCA notes that the Commissioner's published guidance on section 14(1) suggests the decision-maker assess the request to determine whether it would impose an unreasonable burden, taking into consideration:
 - a) the number of requests received
 - b) the duration during which requests have been received
 - c) the pattern of the requests; and
 - d) the breadth of the request.
19. In terms of the overall burden the complainant has placed on the FCA as a result of their requests under FOIA, the FCA confirmed it has received a total of 15 new requests [from the complainant] in 2020, 18 in 2021 and 22 in 2022. Further, eight of those requests received up to the end of 2022 have progressed to requests for internal review.
20. The FCA has emphasised the point set out in the Commissioner's guidance that considerations of burden under section 14(1) of FOIA are not limited to similar requests alone but can also take into account whether the burden imposed by the requester more broadly is disproportionate. In addition to the FOIA requests, the complainant has contacted other areas of the FCA as well, on more than a dozen occasions.
21. Further, the complainant's requests are often submitted within a short time period and can be repetitive in their patterns. The FCA has provided the Commissioner with a full list of the complainant's requests.
22. The FCA also notes that the Commissioner's guidance states that, "the collective burden of dealing with the previous requests, combined with the burden imposed by the latest request, may mean a tipping point has been reached, rendering the latest request vexatious."
23. On reviewing the volume and frequency of their requests, the FCA concluded that an unjustified amount of resource has been utilised on processing the complainant's requests, and that their requests have led

to hugely disproportionate workload for the FCA, and in particular the FCA's Information Disclosure Team.

24. With this in mind, in reviewing the current request, the FCA considered that the "tipping point" had been reached by the complainant's requests such that section 14(1) of FOIA was engaged.
25. Next, in its submission the FCA has discussed the matter of the potential motive, harassment or distress. It considers that the complainant wishes to use FOIA for private motives rather than to increase transparency for the public good. This includes seeking to unduly burden the FCA with requests under FOIA, as well as cause distress and harassment to the FCA and its staff.
26. The FCA says that the complainant's email requests include demanding deadlines, inaccurate and groundless accusations, and criticism of the FOIA Team, and inappropriate language. When viewed together with the number and pattern of their requests, this supports the FCA's view that their motivation, at least in part, is to cause distress to the FCA and its employees.
27. By way of example, the FCA referred to emails the complainant sent to it on 14 and 15 November 2022. These related to a separate request they submitted on 31 October 2022 in which they use aggressive and threatening language such as "Nice try, but still a lie." and "[..], you guys have handed me the tools to brief politicians and the media against the FCA because I can prove this response is untruthful. Your choice!". A further example is, "[..]a review is fine, provided it is concluded, and the truth is supplied to me in place of the lies you've sent me to date in response to this FoI request".
28. When considering their past behaviour, it indicates to the FCA that any explanation it provides to the complainant when refusing a request under FOIA is likely to encourage further criticism, complaints, and new requests. It also appears to the FCA that the complainant does not always have regard for the responses they receive from the FCA as points which they raise again in new requests the FCA has sometimes already addressed previously. The FCA therefore considers that the complainant is harassing the FCA and its employees by making continuous, repetitive, and valueless requests under FOIA.
29. The Commissioner can only consider the situation as it was at the time of the request and internal review request. The FCA's discussion at paragraph 27 about the tone of some of the complainant's correspondence concerns a request and associated emails that post-date the request (and request for an internal review) in this case. The Commissioner has therefore not taken account of that specific correspondence.

30. However, from reviewing the list of the complainant's requests prior to 13 September 2022, he will accept that the cumulative effect of the requests on the FCA from 16 February 2020 to 13 September 2022 is one of harassment to FCA staff. The Commissioner also notes that the requests move from specific FCA reviews/investigations to broader matters such as staff headcounts, its monitoring of social media, its Stonewall Workplace Equality Index, its complaints scheme, and its external advertising of vacancies. This is evidence, in the Commissioner's view, of 'vexatiousness by drift'. As it had the FCA, it suggests to the Commissioner that the complainant is using FOIA less to request information that has a legitimate purpose and more to wear down the FCA.
31. The Commissioner considers that the FCA's submission to him makes a strong case for the request being vexatious. He accepts that the request of 13 September 2022 is broader than the associated request of 16 August 2022 despite the complainant having been advised to narrow that request's scope. But even if that were not the case, such value as the request may have has been undermined by the cumulative effect of the frequency and breadth of the complainant's previous requests. The Commissioner notes that the complainant continued to submit requests for disparate information to the FCA after the request being considered in this case. It is not clear what information the FCA could provide to the complainant that would bring their requests to a stop.
32. To summarise, the Commissioner agrees that responding to the complainant's request would cause a burden to the FCA that is disproportionate to the request's value at the point that the FCA applied section 14(1). The Commissioner also agrees that the cumulative effect of the complainant's requests up to the point of the current request would be to harass FCA staff. As such, the Commissioner's decision is that the FCA is entitled to refuse the complainant's request as a vexatious request under section 14(1) of FOIA.

Right of appeal

33. 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

34. 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.
35. 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

Cressida Woodall
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