

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 February 2024

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested from the Financial Conduct Authority (FCA) information about enforcement action taken under the Senior Managers and Certification Regime (SMCR). The FCA refused to comply with the request on the basis that it was vexatious under section 14(1) of FOIA.
2. The Commissioner's decision is that the FCA was not entitled to rely on section 14(1) when refusing to provide the requested information. He requires the FCA to take the following step to ensure compliance with the legislation:
  - Provide the requested information or issue an appropriate refusal notice which does not rely on section 14(1).
3. The FCA must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

#### **Request and response**

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4. On 26 June 2023, the complainant wrote to the FCA and requested information in the following terms:

"I refer to the recent news reports regarding:

"FCA fails to apply powers for sanctioning misconduct under SMCR".

Please note that 'SMCR' refers to the Senior Managers and Certification Regime.

I would like the following information:

Precisely how many enforcement actions have been taken by, the FCA, since the introduction of the SMCR regime in 2016?."

5. On 20 July 2023, the FCA responded to the request. It cited section 14(1) of FOIA to refuse the request. It said that although it will consider any further requests from the complainant on their individual merits, it may treat further requests on the same / similar topics as vexatious and may not respond to them.
6. The complainant replied to the FCA on the same day and asked it to carry out a review of its handling of the request. They said that the FCA failed to provide any reasoning about its application of section 14 and that this 'may' indicate that it has acted improperly applying a 'blanket refusal'.
7. On 25 August 2023, the FCA carried out a review and wrote to the complainant upholding its original decision. It said that it is not required to explain why the request is vexatious, but may wish to do so under its duty under section 16 of FOIA (advice and assistance). It explained that it took into account the value and serious purpose of the request, the high volume of requests made by the complainant, and their motive for the request.
8. The FCA reiterated that it considers each request on its individual merits and that it did not apply section 14 when responding to other recent requests made by the complainant.

### **Scope of the case**

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9. On 28 August 2023, the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. The Commissioner has considered whether the FCA was entitled to rely on section 14(1) of FOIA to refuse the request.

### **Reasons for decision**

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11. Section 14 of FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious."

12. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC)<sup>1</sup>. It commented that 'vexatious' could be defined as the 'manifestly unjustified, inappropriate or improper use of a formal procedure.' The Dransfield case considered four broad issues: the value or serious purpose of the request, the burden imposed by the request (on the public authority), the motive of the requester, and harassment or distress of and to staff.

13. The Upper Tribunal cautioned that these considerations were not meant to be exhaustive. It emphasised that:

"...all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA"

### **The complainant's position**

14. The complainant said that they made a total of 33 requests over 24 months, which, equates to "1.375 requests per month" on average. They said that the FCA receives higher numbers of requests from other individuals, it cannot therefore reasonably believe that theirs is an excessive number of requests. This is evidence of the FCA's 'improper motive' in applying section 14 because of their former employment status. The full content of the complainant's submission has not been reproduced in this decision notice.

15. The complainant said that they are a member of the public that is interested in 'important issues' and 'serious matters' that were 'often' highlighted in the media. They said that their requests cover a range of 'topical issues' and that they have not continued to pursue a matter after it has been explained or resolved.

16. The complainant said that their requests have not harassed or cause any distress to FCA staff. They have been courteous, clear and in respect of issues the FCA are well acquainted with. They said the FCA is a 'well-funded organisation', and that it confirmed in a response to another

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<sup>1</sup> <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3680>

request that it spent up to one million pounds additional expenditure on temporary and paralegal staff.

## **The FCA's position**

### Value and serious purpose

17. In its initial submission to the Commissioner, the FCA said "there is no information for this request". However, after the Commissioner noted that one of the links the FCA provided (in regard to information it makes available about enforcement action taken, which, it said 'reduces public value in disclosure of the requested information') took him to part of the requested information that is published on the FCA website. It then provided a further submission and a copy of the withheld information.
18. The FCA initially said that "it would be difficult to argue the request has no reasonable foundation". In its further submission it said that it accepts the information would be of "some value" to the public about how the FCA exercises its powers in enforcing misconduct under the SMCR. It again provided links to information the FCA regularly makes available on its website relating to enforcement action taken, which, it said limits the 'value' in the requested information.

### Burden imposed by the request

19. The FCA said that between October 2021 and 26 June 2023 (20 months) the complainant submitted 32 requests for information under FOIA. In the 12 months preceding the principal request (26 June 2002 to 26 June 2023), they made 12 requests for information, 11 internal review requests, and 2 'individual rights requests'. In the 3 months leading up to the principal request, they made 2 new requests under FOIA and 3 internal review requests.
20. The FCA said that although it considers each FOI request on its own merit, the cumulative effect of the complainant's requests, together with subsequent interrelated correspondence, and the measures put in place to ensure that the complainant receives a 'professional', 'impartial' and 'non-biased' service has amounted to a disproportionate burden on the FCA and its Information Disclosure Team (IDT).
21. The FCA concluded that a 'tipping point' had been reached by the burden imposed on the utilisation of its limited resources in responding to the complainant's requests, which detracts from dealing with 'legitimate requests' received from other members of the public. Full details of the measures put in place by the FCA in its submission have not been reproduced in this decision notice.
22. The FCA said that the reasoning around the 'tipping point' fits the 'previously identified' pattern of behaviour in the complainant's

requests. The FCA provided a copy of a previous submission to the Commissioner relating to a complaint from the same complainant about the FCA's application of section 14 to a previous request for information.

23. In addition to information about the number of requests and overlapping requests made by the complainant, the previous submission explained that the 'tipping point' was reached when it was decided that the requests contributed to an unmanageable workload for the IDT, and had created an imbalanced and unsustainable utilisation of resources.

#### Motive of the requester

24. The FCA said in its further submission to the Commissioner that due to his previous employment status, the complainant is likely to be 'aware' of information published on its website, and when considered in this context the request was deemed to be vexatious, which, is why it applied section 14 and not section 21 (information accessible by other means) to refuse the request. The full content of the FCA's submission has not been reproduced in this decision notice, the annex includes the submission it provided in relation to the complainant's previous complaint and the decision notice (IC-170349-D4K0).
25. The FCA said that due to the complainant's previous employment status he has made a number of requests under FOIA, complaints to the ICO, and appeals. It said that it has identified a pattern where the aim of the requests and interrelated correspondence is to cause disruption and burden and harass staff.
26. The FCA said that although the request says the news report in the media is the basis for the request, the complainant in fact 'seizes' any media coverage as a basis for making requests for information. It also said that the complainant makes requests via the website 'What do they know' where FOI requests and responses are published to the world at large. It said that the request is therefore not in the wider public interest relating to transparency but to further his own 'personal motives'.

#### Harassment and distress

27. The FCA said that although the request contains no aggressive language and in isolation would not intend to harass or cause distress, it can however be 'reasonably inferred' that the 'wider campaign of requests are hostile in nature' and designed less to access information than to 'wear down' the FCA and its staff. The FCA made reference to the complainant's previous employment status. The full content of the FCA's submission has not been reproduced in this decision notice.
28. The FCA said that to prevent colleagues from experiencing undue stress as well as maintain a fair and unconflicted FOI service, the complainant's

requests have been separated from “the Team” to avoid potential conflicts of interests. This creates additional burden for the team.

## **The Commissioner’s position**

### Value and serious purpose

29. The Commissioner notes the complainant’s view that the request has value and serious purpose.
30. The Commissioner notes that the FCA’s website states that the SMCR was initially applied to the banking sector as part of the government’s response to the ‘2008 banking crisis’. It now also applies to building societies, credit unions, investment firms and insurers. Its aim is “to reduce harm to consumers and strengthen market integrity by making individuals more accountable for their conduct and competence”.
31. The Commissioner notes that the published information shows the number of enforcement actions taken under the SMCR from 2016 and up to 28 March 2022 (when it was last updated). The withheld information therefore covers any enforcement action taken under the SMCR between 28 March 2022 and the date of the request: 26 June 2023 (8 months).
32. The Commissioner has reviewed the withheld information, when taking into account the published information, he notes that the withheld information may also provide insight in to action under the SMCR.
33. The Commissioner notes that the FCA said it would be difficult to argue that the request has no “reasonable foundation” and would be of “some value” and has provided very little in terms of arguments for there being no value and purpose in the information. It can only say that any value or purpose is outweighed by the effect of the frequency and breadth of the complainant’s previous requests (addressed below), and that the information it has published on its website limits the ‘value’ in the requested information. The Commissioner has viewed the published information but notes that it ultimately includes part of the requested information.
34. The Commissioner refers to points 88 and 89 of his ‘Dealing with vexatious requests (section 14)’<sup>2</sup> guidance. It states that if a public authority considers a request for information included in its publication to be vexatious, then it can apply Section 14, provided it meets the

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<sup>2</sup> [Dealing with vexatious requests \(Section 14\) v1.3 20151218 \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-the-information-commissioner/dealing-with-vexatious-requests-section-14)

criteria. Nonetheless, he would generally expect requests for information in a publication scheme to be refused under Section 21, on the grounds that the information is reasonably accessible to the applicant by other means.

35. It is therefore the Commissioner's view that there is a clear objective public interest in the withheld information relating to transparency and performance of the public authority

#### Burden imposed by the request

36. The Commissioner notes the complainant's view that the number of requests they said they made to the FCA over the 24 month period preceding the request, this equates to '1.375' requests per month, and that they said the FCA receives higher numbers of requests from other individuals.
37. The Commissioner notes that the evidence provided by the FCA shows that the complainant has made 32 requests for information under FOIA in a 20 month period (Oct 2021 – June 2023) preceding the request. Of these, 12 requests were made in the 12 months preceding the request, this averages to 1 request per month. They also made 11 internal review requests, and 2 'individual rights requests'.
38. The Commissioner acknowledges that most requesters would not generally send 1 request per month. However, he is also not convinced that this average represents an excessively high number of requests (including related requests for internal reviews) for the time period.
39. The Commissioner acknowledges the measures taken by the FCA in processing the complainant's requests, reviews and related correspondence. He however also notes that given the complainant's previous employment status, the specific measures taken, and that this is to ensure a professional, impartial and non-biased service is provided to the complainant. The burden of the measures in processing requests therefore appear to be a reasonable one. The Commissioner also assumes that it would be the general aim of the FCA to provide a professional and non-biased service when dealing with all requesters.
40. The Commissioner is therefore not convinced that processing the request would impose an unreasonable burden on the FCA's resources that outweighs the value and serious purpose of the request.

#### Motive of the requester and wider context

41. The Commissioner notes the complainant's view that the request was for information that relates to an important and serious matter covered in the news media.

42. The Commissioner notes that the FCA has (in its further submission) attempted to retrospectively argue that it initially deemed the request vexatious because it believed the complainant had knowledge of the published information. This is because the Commissioner notes that in its initial submission it was not in fact aware the information was held and published on its website. Also, even if the FCA had initially applied section 21 to refuse the request, it does not appear to be aware that the exemption would only cover the published information and not the remaining withheld information.
43. The Commissioner notes the FCA's view that the aim of the complainant's request is to cause disruption and burden / harass staff and the reason for this. He has reviewed information about the complainant's requests made over the 20 months preceding the principal request. He notes that they range from confirmation whether the FCA's FOI service has been benchmarked against other organisations, to the number of senior managers on PIPs, to a list of all claims management companies regulated by the FCA etc.
44. The Commissioner has also reviewed the decision notice (IC-170349-D4K0) relating to the complainant's previous request, which, makes reference to 'vexatiousness by drift' in relation to the scope of the complainant's requests being wide ranging.
45. The Commissioner also notes the FCA's view that the complainant made the request because they 'seize' any media coverage as a basis for requests whilst simultaneously holding the view that due to their previous employment status they were 'aware' of the published information.
46. The Commissioner notes that, although there appears to be some evidence of the complainant making requests following news / media coverage of the FCA, the majority of the requested information was already published on the FCA's website at the time of the news reports about the SMCR. Therefore, if the complainant was indeed 'aware' that the majority of the requested information was published, this knowledge in fact negates the FCA's argument that the complainant in fact 'seized' the media coverage as an opportunity to make the request.
47. The Commissioner also notes that if the complainant had knowledge of the published information at the time of the news reports, the timeframe of their request would likely have only covered any information from 28 March 2022 (the date the published information was last updated) up to the date they made the request.
48. The Commissioner also does not agree that the public forum 'What do they know', where, the FCA in fact responded to the complainant's



request as well as other individuals' requests for information generally is being used by the complainant to further his own 'personal motives'.

49. The Commissioner acknowledges that there can be legitimate reasons why the information requested may change, e.g., the responses to earlier requests may alert a requester to information which they were previously unaware about. However, in this particular case he notes the complainant was unaware that part of the requested information was already published at the time of the request and that there is an objective public interest in the information. It is therefore accepted that there is a legitimate motive for the complainant's request in this case.

#### Harassment and distress

50. The Commissioner notes that both the complainant and FCA acknowledge that the request contains no aggressive or offensive language.
51. The Commissioner notes that, the FCA said the 'wider campaign' of the complainant's requests are hostile in nature and are an attempt to harass the FCA and IDT staff. Whilst he acknowledges that some of the previous requests relate to the FCA's IDT, others do not and that the request in this case specifically relates to enforcement action taken under the SMCR. He also notes that the complainant's requests over the 12 months preceding the request average to 1 request per month and one internal review
52. The Commissioner notes the measures put in place by the FCA to process the complainant's requests, which, in fact would circumvent and reduce 'stress' to staff in the IDT team. He also notes that the FCA has not in fact provided any evidence or examples of 'stress' caused as a direct result of processing the complainant's requests and related correspondence.
53. The Commissioner notes that, the FCA said the measures ensure that a 'fair service' is provided and avoid 'conflicts of interest', which, he assumes would be the general aim of the FCA when dealing with all requesters, and in his view has been considered under the 'burden imposed by the request' (above). He therefore does not agree that these measures solely serve to prevent any harassment and distress to staff.
54. The Commissioner regards the principles of transparency and accountability to be a positive one. In this case he persuaded that it is sufficient to justify the level of disruption that the FCA has described.
55. The Commissioner therefore considers that the value and purpose in the requested information outweighs the burden of complying with the request imposed upon the public authority and is not satisfied that the FCA was entitled to refuse the request on the basis of section 14 of FOI.

## **Other matters**

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### The Commissioner's decision

56. The Commissioner's decision applies to the request in this case only, and does not have any bearing on his position concerning any other complaints (from the complainant) relating to the FCA's handling of / application of exemptions to requests for information.

### The FCA's application of section 14 to requests

57. The complainant said that the FCA has been 'working to disallow' their requests under FOIA because of their previous employment status. The Commissioner notes that the complainant has not provided any evidence of this and that he has also not seen any evidence of this during his investigation.
58. The Commissioner notes that although the FCA does not appear to have checked whether or not the requested information was held at the time of responding to the initial request, he is reminded that it is not necessarily required to do so when applying section 14 to refuse a request (see below), and that there is no evidence that this is because of the complainant's previous employment status.
59. The Complainant also said that the FCA does not acknowledge their chasers / enquiries when it is 'late to respond'. It does not provide 'any' reasoning for applying section 14 to requests. It does not explain how or why 'assertions' it has made (in applying the exemption) apply to the specific requests. It 'automatically' applies section 14 to requests. It said it will continue to refuse requests that are 'similar' but has not explained what this means.
60. The Commissioner notes that the complainant has not provided any evidence of these issues, and that it is not the role of the Commissioner to search for information to substantiate their complaint where no evidence has been presented of the issues at the outset.
61. The Commissioner also refers to the section titled 'Refusing a request' in his 'Dealing with vexatious requests (section 14)'<sup>3</sup> guidance. It states that public authorities do not have to confirm or deny whether the requested information is held and that there is no obligation to explain why the request is vexatious. However public authorities should 'aim' to be helpful and although he considers it good practice to include the

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<sup>3</sup> [Dealing with vexatious requests \(Section 14\) v1.3 20151218 \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-the-law/foia/guidance-on-section-14)

reasoning for the decision (in the refusal notice), the question of what level of detail, 'if any', to include will depend on the 'specific circumstances' surrounding the request.

62. The Commissioner also notes that there is also no evidence that the FCA is issuing 'automatic' refusals in response to the complainant's requests. He notes to the contrary that, in the FCA's initial response it stated that it has applied section 14, that the request was considered on its individual merits and that any future requests will be treated the same. This was also reiterated in the FCA's review.
63. He also notes the FCA's comments that it did not apply section 14 to refuse the complainant's other recent requests. He also notes that the FCA has responded to the complainant's principle and other requests under the FOIA, which, suggests that its refusals are not 'automatic' but that it has read and considered the requests in order to process and reply to them under the correct legislation.

#### The quality of the FCA's submissions

64. The Commissioner is disappointed in the quality of the FCA's submissions in this case. The FCA was initially asked to justify its application of section 14 and given 10 working days to provide a submission. It was then given a further 7 working days to provide further information. The FCA however decided to provide a further submission after 31 working days.
65. The Commissioner notes that the FCA's submissions do not appear very well thought out, lack substance, and have not fully considered the four 'broad issues' in order to engage section 14. He also notes that where the FCA wishes to provide 'wider context', it has decided to refer the Commissioner to its submission relating to the previous complaint, instead of providing a substantive response that includes the wider context information incorporated within it for the purpose of the request in this case.
66. He would remind the FCA that it is not the role of the Commissioner to review an entire submission (relating to a previous complaint) in addition to the two submissions that it has provided in order to extract any information that would support the FCA's position in this case.

## Right of appeal

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67. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

68. 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.
69. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**