

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

### **Decision notice**

**Date:** 5 August 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 (the FCA) the protocol for supervisors when investigating protected disclosures about the firms they supervise. The FCA disclosed some of this information but withheld parts of it under section 31 of FOIA – law enforcement and section 40(2) of FOIA – personal information.
2. The Commissioner's decision is that the information was correctly withheld by the FCA under sections 31(1) and 40(2) of FOIA.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 6 October 2023 the complainant wrote to the FCA and requested information in the following terms:

"I would like a copy of the protocol or any rules/guidance that supervisors must follow when investigating protected disclosures passed to them by the FCA's whistle-blowing team relating to the firms they supervise."
5. On 3 November 2023 the FCA refused to provide the information, citing section 31(1)(g) of FOIA.

6. The complainant requested a review on 8 November 2023 and the FCA sent a holding email on 7 December 2023.
7. The FCA provided its internal review on 19 January 2024 in which it maintained its position and set the likelihood of the identified prejudice at the higher level. The FCA also provided some publicly available information about how the FCA handles disclosures by whistleblowers – [How we handle disclosures from whistleblowers \(fca.org.uk\)](https://www.fca.org.uk/how-we-handle-disclosures-from-whistleblowers)

## Scope of the case

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8. The complainant contacted the Commissioner on 27 February 2024 to complain about the way their request for information had been handled. They believed that the FCA had incorrectly applied the public interest test. The complainant was confused about why the FCA had stated that information about how it handles whistleblower information is freely available on its website as they were very familiar with the website and had been requesting an internal protocol for supervisors.
9. On 19 June 2024, after the Commissioner began his investigation, the FCA disclosed the following information to the complainant –  
  
'Supervision: Whistleblowing 'How to Guide' for SPC & Authorisations Divisions' and  
  
'How to guide Reactive Supervision'.  
  
Some of this information was withheld under section 31 of FOIA.
10. However, the complainant was not content with the level of redaction or the need to withhold "index categories".
11. The Commissioner considers that the scope of his investigation is whether the FCA is entitled to rely on section 31(1)(a) and (g) of FOIA as a basis for refusing to provide the withheld information. For the sake of completeness, he will also look at the FCA's citing of section 40(2) – personal information, though it was not the subject of this complaint but the FCA only cited this exemption during the investigation.

## Reasons for decision

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### Section 31 – law enforcement

12. Section 31 of FOIA states:

“(1) information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

a) the prevention or detection of crime,

g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

(2) The purposes referred to in subsection (1)(g) to (i) are:

a) the purpose of ascertaining whether any person has failed to comply with the law,

c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.”

13. As the Commissioner has noted in a previous decision notice, the FCA regulates financial services firms and financial markets in the UK. It gets its regulatory powers from the Financial Services and Markets Act 2000 (the FSMA)<sup>1</sup>.
14. Part 11 of the FSMA outlines the FCA’s powers to gather information, with a view to investigating any concerns and ascertaining whether the FSMA has been complied with.
15. The FCA’s handbook<sup>2</sup> outlines its approach to exercising the main enforcement powers given to it by the FSMA.
16. The Commissioner invited the FCA to provide any further argument to that it had sent to the complainant in June but the FCA did not wish to add anything further. Therefore the Commissioner has largely made his decision based on the arguments provided to the complainant. However, the Commissioner did ask subsequently for further argument as to why the FCA had redacted certain information.

### **Section 31(1)(g)**

17. The FCA argues that the exemption applied -

“because disclosure of some of the redacted information would reveal the inner workings of the FCA’s supervisory teams, placing

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2000/8/contents>

<sup>2</sup> [EG 1 - FCA Handbook](#)

detailed information about our methods of identifying harm / potential causes of harm to consumers and markets more widely in the public domain. The redacted information includes detailed information about the FCA's taxonomies, methodologies and defined drivers for decisions relating to investigations arising from protected disclosures."

18. The harm to its function of "ascertaining or monitoring compliance" with its,

"regulatory requirements would be likely to occur over time rather than in relation to a specific investigation, because disclosure of the protected information would be likely to lead to a loss of flexibility and judgement by the FCA in the use of its processes and resources".

To be specific, the FCA's view is that "disclosure may result in -

"(i) firms changing their conduct, in the hope of increasing their prospects of avoiding the FCA detecting non-compliance with regulatory requirements; and

(ii) a loss of flexibility and judgement regarding the types of conduct which the FCA considers significant in firms generally (or specifically for certain types of firm), by reliance on the issues identified using our Harm and Cause of Harm taxonomies in particular.

19. The FCA contends that firms may think that they can -

"reduce the possibility of any non-compliance being detected by the FCA, because they consider they have a detailed understanding of the matters the FCA has (or has not) identified as of high risk to markets and consumers".

Disclosing "detailed information of this nature...could potentially lead to the FCA being 'gamed', to the detriment of its ability to fulfil its functions relating to the purposes set out in section 31(2)(a) and (c)".

20. It refers the complainant to what it describes as the Commissioner's acceptance<sup>3</sup> ,

"that financial markets are very sensitive to the actions of the regulator and that participants in those markets closely watch the

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<sup>3</sup> [IC-40642-L0K8 \(ico.org.uk\)](#) and [ic-103643-q9d3.pdf \(ico.org.uk\)](#)

FCA for clues about the areas in which regulatory action might take place.”

There are “occasions where a regulator needs to create a degree of uncertainty among those it regulates as to where its priorities are focused at any given time”. It considers that -

“The more information that is available about how the FCA reacts to intelligence it receives confidentially, the better able an unscrupulous entity will be to make an accurate assessment of the likelihood of a particular activity warranting increased regulatory oversight”

and calculate the risk that would be likely to follow from that activity.

21. Not being able to second-guess or anticipate the FCA makes it more likely that firms or individuals “strive for a higher standard of compliance in the first place”. Disclosing the withheld information “would prejudice the effectiveness of the FCA’s way of regulating”. In other words, the FCA originally believed that there is a more than 50% chance of the disclosure causing the prejudice. Later it reconsidered its position and lowered the likelihood to “would be likely to prejudice” the functions that section 31(1)(g) protects. It assessed the degree of risk, that there “may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not”.
22. The Commissioner accepts that section 31(1)(g) is engaged at the lower level of prejudice. He agrees that disclosing the withheld information may compromise the FCA’s functions regarding the purposes it had identified, resulting in firms being able to avoid the regulator’s detection of non-compliance.

### **Section 31(1)(a)**

23. After the FCA had reconsidered its position, it extended its argument to encompass section 31(1)(a) of FOIA which applied to some of the requested information – namely,

“details of the systems used by supervisory teams to manage and close investigations arising from protected disclosures. This includes step by step guidance on the operation of specific systems including diagrams and screenshots from within those systems”.
24. During the course of the investigation the Commissioner asked the FCA about its withholding of certain details – namely, some of its systems and the names of its teams. At that point, the FCA specifically cited section 31(1)(a) as the exemption that applied to those specific details. The FCA acknowledged that the disclosure of the names of some systems used to store and manage types of confidential information may attract more risks than others and that, although there have been

references to the systems it uses in the public domain, it has not confirmed what systems it uses for purposes relevant to this request. It is concerned that to confirm what systems or repositories it uses when investigating protected disclosures, in addition to other information it has "disclosed, would reveal more detailed information than is publicly available about where and how sensitive and confidential data is stored".

25. Regarding the names of teams, the FCA redacted these because it "would be easy to guess the format of related shared e-mail addresses and it provided examples. Additionally "reductions were made to avoid the potential targeting of otherwise internal mailboxes with malware including phishing emails". The FCA had disclosed "the names of teams that are well known and their email contacts well documented, such as those for the Whistleblowing team".
26. The FCA needs to be able -  
  
"to keep their systems safe and secure from cyber-attacks to ensure our role as financial regulator is not compromised. Disclosure of the information requested would be likely to prejudice the prevention or detection of crime as placing details of the systems we use (sic) in the public domain would enable criminals to draw conclusions about our specific technology configuration which, in turn, may enable them to launch cyber-attacks on our systems".
27. It describes how "attackers' use of public references to technology configurations for reconnaissance is well documented". The withheld information (if released) "could be combined with other details to provide attackers with a fuller view" of the FCA's specific technology environment. The FCA describes this as the 'mosaic effect' which could lead to an attack, compromising its role as financial regulator. This would pose a "risk to the FCA's regulatory functions and operations, and consequently to the prevention or detection of crime".
28. The FCA also describes a wider threat that it considers to be "real and significant". The FCA is "a prime target for those who wish to carry out criminal activities, including against the wider UK economy and the UK financial services industry specifically..."
29. The Commissioner accepts that section 31(1)(a) is engaged at the lower level of prejudice as there is a risk of cyber attack which he agrees could be increased by the release of apparently harmless details that can then be added to details already in the public domain with unknown consequences. The FCA has to be constantly vigilant and complete transparency, in this instance, is likely to undermine its ability to detect and prevent crime.

### **Section 31(1)(g) – public interest**

30. The Commissioner next needs to consider whether the requested information is in the public interest and should be disclosed or remain withheld.

**Factors in favour of disclosure -**

31. "The FCA recognises that there is a public interest in accountability and transparency, particularly where this contributes to increasing awareness and understanding of the FCA's use of its statutory powers in respect of the financial services sector."
32. Disclosure would demonstrate how the FCA responds to matters arising in the markets it regulates". It would "enable stakeholders (including regulated firms) to better understand why and how" it makes decisions on regulatory matters".

**Factors against disclosure -**

33. The FCA argues that, "There is a strong public interest in the FCA being able to carry out its functions in the most effective manner possible and in it being able to preserve effectiveness and flexibility in how it uses the regulatory tools at its disposal".
34. The FCA's role is to ensure compliance with the FSMA and protect the "public from financial services that don't comply". It "would hamper the FCA's ability to carry out its work efficiently; which would, in turn, make it more difficult to regulate FSMA".
35. It contended that -
- "disclosure of any process manual/s or guide/s would reveal the inner workings of the FCA's supervisory teams and could potentially lead to the FCA being 'gamed', to the detriment of its ability to fulfil its functions".
36. Although the FCA accepts the transparency and accountability arguments, it does publish "a considerable amount of information on its website to enable firms, consumers and the FCA's key stakeholders understand how it operates and what can be expected of it in return. The FCA provided the following examples of these at the following links:
- [Our approach to supervision | FCA](#)
- [Our approach to consumers | FCA](#)
- [Whistleblowing: How to make a report | FCA](#)
37. The FCA also "has a number of policies and structures in place to ensure that it and the firms and individuals that operate in the financial markets are compliant with the legislation in place, in particular FSMA". It

therefore believes "that there are already sufficient safeguards and public accountability to ensure that the FCA is exercising its functions, and applying its resources, appropriately, fairly and proportionately".

### **The balance of the public interest**

38. The Commissioner has decided that it is in the public interest for this information to remain withheld. The FCA did reconsider its position and released as much information as it considered would not compromise its ability to carry out its function and protect the public. Any undermining of its ability to do so is not in the public interest.

### **Section 31(1)(a) – public interest**

#### **Factors in favour of disclosure**

39. The FCA states that "There is a strong public interest in favour of transparency and in the public being reassured about the effectiveness of the FCA's approach with regard to protected disclosures".

#### **Factors against disclosure**

40. The FCA's view is that the strong public interest lies "in the FCA being able to carry out its functions in the most effective manner possible". In order to do so it needs to be able to keep its systems "safe and secure from cyber-attacks" to ensure that its "role as financial regulator is not compromised". It is not in the public interest to "leave the FCA's systems vulnerable to cyber-attacks by providing attackers with specific details" regarding the configuration of its systems.

### **The balance of the public interest**

41. The Commissioner has carefully considered what might appear to be innocuous details that have been redacted from the disclosed information such as the software it uses, its technology configuration, screenshots and team names. However, he has decided that these details (along with other known details) could be used to compromise the FCA's systems. Although the Commissioner understands the complainant's frustration at the redactions made in the disclosure, given the nature of the FCA's work and its importance in financial regulation, he has decided that it is not in the public interest for this information to be disclosed.

### **Section 40(2) – personal information**

42. In the following analysis the Commissioner will only consider the redaction of limited third party personal information from the information that was provided to the complainant.



43. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
44. Section 3(2) of the Data Protection Act 2018 defines personal data as: "any information relating to an identified or identifiable living individual."
45. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
46. In this case, the withheld information consists of the names and contact details of individuals working at the FCA. Therefore, the Commissioner is satisfied that the withheld information is personal data as the information relates to and identifies those individuals.
47. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
48. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
49. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
50. The Commissioner accepts that the complainant is pursuing a legitimate interest in requiring all the withheld information in order to fully understand it.
51. The FCA has argued that disclosure would contravene data protection principles:

"In particular, it would be a breach of the first data protection Principle as set out in Article 5 of the UK GDPR, to disclose such information, as it would not be lawful or fair to the individuals concerned to do so. This is because, they would not have had the expectation that this information would be disclosed under these circumstances, and therefore disclosure would not be necessary, or lawful, as none of the conditions in Article 6 of the UK GDPR have been met."

52. The Commissioner usually considers whether the individual is acting in a private or professional capacity and their seniority. Though these individuals are clearly acting in their professional role, the Commissioner considers that the nature of the requested information is an additional factor against disclosure and, for that reason, they are unlikely to expect their names and contact details to be disclosed. The Commissioner does not consider the legitimate interest identified is sufficient to outweigh the rights and freedoms of the third party individuals for whom there may be unknown implications.
53. Disclosure under FOIA must be the least intrusive means of achieving the legitimate aim in question. In this instance the Commissioner does not consider that disclosure is necessary.
54. As the Commissioner is satisfied that disclosure is not necessary, there is no lawful basis for disclosure and therefore the FCA was entitled to rely on section 40(2) of FOIA to withhold the information, by way of section 40(3A)(a).

### **Other matters**

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55. The section 45 code of practice<sup>4</sup> recommends that public authorities complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from the receipt.
56. In this case the FCA did not provide an internal review until well beyond the recommended timeframe.

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<sup>4</sup> [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)

## **Right of appeal**

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57. 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)

58. 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.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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