

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 September 2016

Public Authority: Financial Conduct Authority
Address: 25 The North Colonnade
Canary Wharf
London
E14 5HS

Decision (including any steps ordered)

1. The complainant has requested information as to whether the Financial Conduct Authority (FCA) has investigated an alleged breach by a financial firm regulated by the FCA. The FCA refused to confirm or deny whether it held this information on the basis of section 31(1) and (3) and 43(2) and (3).
2. The Commissioner's decision is that the FCA has correctly applied the exclusion in section 43(3) to neither confirm nor deny if the information is held. She requires no steps to be taken.

Request and response

3. The complainant had engaged in correspondence with the FCAs customer contact centre regarding an alleged breach of a particular bank's terms and conditions of mortgage offers to customers.
4. Following this, on 7 January 2016, the complainant wrote further to the FCA and requested information in the following terms:

"Please can you answer the following questions under the Freedom of Information Act.

Is this matter currently under consideration by the FCA?

If not, what information did you receive that prevented you from carrying out an investigation?"

5. The FCA responded on 4 February 2016. It stated that it could neither confirm nor deny whether the information was held as to do so would be likely to prejudice the exercise by the FCA of one of its functions under the Financial Services and Markets Act 2000 (FSMA) for any of the purposes specified in subsection 31(2) of the FOIA. The FCA also considered section 43(3) applicable in the alternative – that confirming or denying if the information was held would be likely to prejudice the commercial interests of the bank in question.
6. Following an internal review the FCA wrote to the complainant on 3 March 2016. It upheld its decision to neither confirm nor deny if information was held.

Scope of the case

7. The complainant contacted the Commissioner on 8 March 2016 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if the FCA was correct to neither confirm nor deny if information was held either by virtue of the provisions at section 31(1) and (3) or section 43(2) and (3).

Reasons for decision

Section 43(3) – commercial interests

9. When a public authority receives a request for information it is required under section 1(1)(a) of the FOIA to confirm whether or not it holds that information. However, section 43(3) of the FOIA states that a public authority is not obliged to confirm or deny whether information is held if to do so would, or would be likely to, prejudice the commercial interests of any person.
10. For the exemption to apply disclosing whether the information is held, and whether any investigation was carried out or pending, must be harmful to someone's commercial interests. There must be a causal link between revealing whether the information is held and the alleged prejudice. The prejudice must be real, actual and of substance to engage the exemption.

11. When considering the exclusion from the duty to confirm or deny a public authority is not restricted to considering the consequences of the actual response that it would be required to provide under section 1(1)(a). For example, even if the public authority does not hold the information it can consider what would happen if it was in a position where it did have to confirm that the information was held. That is, the public authority only needs to demonstrate that either a hypothetical confirmation or a hypothetical denial would engage the exemption.
12. In light of this, the FCA has explained that if, hypothetically, it had to confirm that it held information relating to an investigation into a named firm and an apparent breach of its own terms and conditions, this would reveal whether it had investigated the firm and this matter. Disclosing that a company has been, or is being, investigated would be likely to damage the reputation of the firm. The Commissioner accepts there is a logical connection between revealing that a firm has been the subject of a complaint and investigation by the FCA and damage to that firm's reputation.
13. However, before accepting the exemption is engaged it is necessary to consider a number of other factors. Firstly, the FCA has confirmed that the prejudice that would be likely to occur by either confirming or denying if the information is held would be to the commercial interests of the named firm.
14. The Commissioner recognises that the FCA has a thorough understanding of how the financial services market operates and is therefore well placed to explain how confirming whether a firm has been investigated or inquiries have been made would be likely to prejudice that firm's commercial interests.
15. In this case the FCA argues that confirming or denying if the requested information is held and therefore whether the FCA is investigating the alleged breach could lead to external speculation and comment. The FCA is of the opinion that the importance of reputation for regulated firms is of note here as confirming or denying if the information is held could be damaging to the named firm's reputation and therefore its place in the commercial market, if the information were held.
16. In support of this position, the FCA has pointed to the decision of the Information Tribunal¹ in a previous case where the FCA's predecessor body, the Financial Services Authority (FSA), had refused to provide

¹ EA/2008/0061

information on a known investigation under section 43(2). The Tribunal put specific emphasis on the importance of the legal framework in which the FSA and now the FCA operates, in particular the requirements of the FSMA and section 348 which details the confidential nature of the information held by the FCA.

17. Whilst the case here is different, in that the FCA does not consider it can either confirm or deny if the information is held without the stated prejudice occurring; the Commissioner recognises the confidentiality provisions of section 348 are still a relevant consideration as the Tribunal accepted that the views of the FCA in relation to the conduct of those it regulates should remain private unless and until a decision to take formal action is made.
18. In light of the above, the Commissioner is satisfied the exemption at section 43(3) is engaged.

Public interest test

19. The FCA acknowledges there is a public interest in transparency and in the public being aware of the actions and considerations that the FCA has taken in respect of firms it regulates in the financial services industry.
20. If an investigation had taken place or was going to take place there may be some people affected by the alleged issue and if these numbers were large the public interest in confirming or denying would increase. There is clearly a public interest in making information available that would inform the public about problems or poor practice by firms operating in the financial services market. .
21. However, the FCA has explained that where a firm is investigated and it concludes there are problems which require regulatory action, it does publish the findings of these investigations in the form of final notices. Therefore the public interest in protecting consumers is already satisfied to a large degree.
22. The Commissioner is satisfied that there is some public interest in confirming whether or not the FCA investigated this issue, but that this is limited to the general public interest in the FCA being transparent in the way in performs its regulatory functions. This limited public interest now has to be balanced against the public interest in refusing to say whether the information is held and preventing a possible prejudice to the commercial interests of the firm.
23. It is difficult to precisely quantify the severity of the prejudice that is likely to occur to the commercial interests of the financial firm if; hypothetically, the FCA had to confirm the information was held.

However, the Commissioner accepts that the financial services industry is very competitive and recognises the importance of reputation in terms of attracting stakeholders, investors and customers. She therefore finds that the prejudice would be significant.

24. The financial services industry is an important component of the UK economy. There is a public interest in private sector companies being able to operate effectively in that market. It would work against the public interest to disturb the market by unfairly prejudicing the commercial interests of any of the companies operating in it.
25. The Commissioner understands that where a company is investigated and any complaints are upheld the FCA publishes its findings but a final decision is only published once the company has had the opportunity to formally comment on the FCA's preliminary findings. This process means that the FCA only makes its findings public where the actions of the party under investigation warrant doing so and after a fair process has been followed. To reveal the existence of an investigation, and prompt speculation and damaging adverse comments, in other circumstances would be unfair.
26. The Commissioner considers it is important to firms that they are able to deal with the FCA without worrying they will be unfairly penalised as a result. The Commissioner also recognises the FCA benefits from the firms it regulates having confidence their business affairs will remain private except where the FCA takes formal action. This enables the FCA to carry out its regulatory duties efficiently and effectively.
27. However, when considering the public interest in respect of section 43 the Commissioner is focused on the public interest in preventing a prejudice to the commercial interests of the relevant firm and the public interest in not interfering in the operation of the financial services market. She is satisfied there is some public interest in the FCA confirming or denying whether it had or is investigating this alleged breach by a named firm but this has to be weighed against the public interest in preventing a prejudice to the commercial interests of that firm and the impact of this on the operation of the financial services market.
28. On balance, the Commissioner finds that the public interest favours maintaining the exclusion from the duty to confirm or deny whether the information is held. The Commissioner does not require the FCA to take any further action and she has not gone on to consider the application of section 31 to this information.

Right of appeal

29. 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@hmcts.gsi.gov.uk

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

30. 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.
31. 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

Jill Hulley
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Information Commissioner's Office
Wycliffe House
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