

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

### **Decision notice**

**Date:** 9 June 2014

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

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

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1. The complainant has requested the Financial Conduct Authority's (FCA) internal guidance on the use of attestations as a supervisory tool and in enforcement cases. The FCA explained that, as attestations were not used as part of the enforcement process, it did not hold any information about their use in such cases. It did provide some of its internal guidance on their use as a supervisory tool but withheld the remainder under section 36 – prejudice to the conduct of public affairs. During the Commissioner's investigation the FCA also applied section 31 – law enforcement to the same information.
2. The Commissioner's decision is that the FCA was wrong to rely on section 36 to withhold the information. However it was entitled to rely on section 31 in respect of the majority of the information. In respect of a very limited amount of information the Commissioner finds that section 31 is not engaged. The FCA is required to disclose this information.
3. The public authority must take these steps 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 the Act and may be dealt with as a contempt of court.

## Request and response

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4. On 8 October 2013, the complainant wrote to the FCA and requested information in the following terms:
  - “(i) All internal policy or guidance delivered to FCA Supervision managers/employees on the use of attestations as a supervisory tool; and
  - (ii) All internal policy or guidance delivered to FCA Enforcement managers/employees on the use of attestations in enforcement cases.”
5. ‘Attestations’ are formal undertakings given by individuals within a firm that they will either take a particular course of action, or are in a position to confirm that the company is complying with a particular aspect of the regulatory regime. The actual individual signing the attestation is responsible for ensuring the undertaking is adhered to.
6. The FCA responded on 5 November 2013. It explained that as attestations were not part of the enforcement process it did not hold the information requested in the second part of the request. The FCA confirmed that it held guidance on the use of attestations as a supervisory tool but withheld that information under the exemptions provided by sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c). This was on the basis that disclosing the information would inhibit the free and frank provision of advice, the exchange of views or would otherwise prejudice the conduct of public affairs.
7. Following an internal review the FCA wrote to the complainant on 14 January 2014. It stated that it was now prepared to provide some information. It no longer applied section 36(2)(b)(i) and (ii). However it maintained its reliance on section 36(2)(c) to withhold the remainder of the information.
8. During the course of his investigation the Commissioner advised the FCA that the arguments it had presented in support of its use of section 36(2)(c) appeared to relate to the interests protected by section 31(1)(g), and in particular the protection of the FCA’s regulatory functions. In light of this the FCA maintained its reliance on section 36(2)(c) and in addition applied the exemption provided by section 31.
9. The FCA advised the complainant of its application of section 31 on 27 May 2014 at which time it also disclosed further information to the complainant.

## Scope of the case

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10. The complainant contacted the Commissioner on 5 February 2014 to complain about the way his request for information had been handled. The complainant was concerned that information had been withheld and also about the way in which the internal review had been conducted.
11. The Commissioner considers that the matter to be decided is whether either section 36 or 31 are engaged and if so whether the public interest favours maintaining either of those exemptions. The matters which the complainant has raised in relation to the conduct of the internal review are not requirements of part I of the FOIA. They cannot therefore be addressed in the main body of this notice. However the Commissioner has addressed these concerns under 'Other matters'.

## Reasons for decision

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### Section 36

12. The application of section 36 is based on the opinion of a qualified person. The qualified person is someone who is specifically appointed to that role under the provisions of the FOIA. In the case of the FCA each member of its Board is authorised to act as a qualified person.
13. Section 36(2)(b) of the FOIA provides exemptions where, in the opinion of the qualified person, the disclosure of the information would, or would be likely, to inhibit the free and frank provision of advice or exchange of views. Section 36(2)(c) then states that information is exempt if, in the opinion of the qualified person, its disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs.
14. It is clear from the wording of the exemption that section 36(2)(c) applies to circumstances not covered by section 36(2)(b). Furthermore as explained in the Commissioner's guidance on section 36, it has been established by the Tribunal that section 36(2)(c) is intended to only apply to situations which are not covered by other exemptions.
15. In broad terms, the FCA's basis for applying section 36(2)(c) is that releasing the information would be likely to undermine the effectiveness of attestations as a means of supervising or regulating the conduct of firms operating in the financial services industry. The Commissioner considers that if the FCA is concerned about protecting its ability to carry out its function of regulating the financial services market it should consider one of the exemptions provided by section 31. Section 31(1)(g), in conjunction with section 31(2)(c), provides an exemption

where a public authority believes such regulatory activities are at risk of being prejudiced. In these circumstances the Commissioner finds that the exemption provided by section 36(2)(c) is not available to the FCA.

16. The Commissioner would emphasise that it is not necessary for the information to actually be exempt under another exemption in order for section 36(2)(c) to be unavailable. The test is whether another exemption exists which is designed to protect the interests which the public authority believes to be at risk.
17. There is a clear rationale for this approach. Since all the exemptions exist to some extent to protect the conduct of public affairs, allowing section 36(2)(c) to be used where another, more specific, exemption exists would render the other prejudice based exemptions obsolete and encourage the over use of section 36(2)(c). This is undesirable as section 36 is engaged on the basis that the qualified person is of the opinion that prejudice would arise rather than the need to directly demonstrate a causal link between the disclosure of the information and the prejudice envisaged.

### **Section 31**

18. Section 31(1)(g) of the FOIA provides that information is exempt if its disclosure would or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2).
19. The purpose specified by paragraph (c) of subsection (2) is that of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
20. For section 31(1)(g) to be engaged via section 31(2)(c) a public authority has to have a specific function in respect of ascertaining whether regulatory action is required. There would then have to be a risk of that function being harmed if the information was disclosed. The Commissioner is satisfied that the FCA does have a statutory function under the Financial Service and Markets Act 2000, as amended by the Financial Services Act 2012, to supervise authorised persons (those individuals authorised to provide particular financial services, for example selling investments or providing mortgages) as well as for determining whether non authorised persons are complying with the relevant requirements of that Act.
21. The exemption can be applied on the basis that either the alleged prejudice would occur if the information was disclosed, or that the prejudice would be likely to occur. The Commissioner understands that the FCA has applied the exemption on the basis of the lower threshold ie

that disclosing the information would be likely to prejudice the FCA's regulatory function.

22. The Commissioner understands that attestations are one of the supervisory tools used by the FCA. The attestations can require the individual in question to provide the FCA with information on a particular aspect of the firm's work or to take steps to address a particular issue. The individual's and the firm's response to the request to provide an attestation and any information they subsequently supply to the FCA will inform the FCA's decision as to what, if any, further action is required.
23. The Commissioner is therefore satisfied that the use of attestations is itself a means of regulating the financial services market. Importantly they also form part of the process of gathering information on which to base the use of more formal regulatory activity. Therefore if disclosing the requested information would be likely to undermine the effectiveness of attestations the Commissioner accepts that the exemption provided by section 31 would be engaged.
24. Attestations provide firms with the opportunity to put their own affairs in order without the need for more formal regulatory action being taken, whilst at the same time making identified individuals accountable for dealing with the issue in question. The FCA argues that an important component in the strategy for using attestations is that firms and individuals cannot anticipate when they will be used in preference to more formal measures. It considers that the withheld information could allow firms to be more confident about when attestations will be used. The Commissioner accepts that if firms were able to second guess what issues would be dealt with by the use of attestations it would undermine their use and the FCA may have to adopt other approaches. The use of attestations is relatively recent and the Commissioner considers that overtime it is possible that the firms will become more familiar with how and when attestations are used. Even so the Commissioner accepts that if the disclosure of the requested information did allow firms to anticipate their use, this would be prejudicial.
25. Attestations can seek assurances that steps will be taken to resolve a particular problem or require information on a particular matter to be furnished to the FCA. The Commissioner understands that the FCA is not overly prescriptive in terms of the actions or information which the attestations seek to secure. In this way the firms cannot be certain what they must do in order to satisfy the FCA that they have properly addressed whatever problem has been identified. The FCA argues that it is important for there to be this uncertainty as it ensures that firms are not tempted to do the minimum necessary. If they are unable to anticipate what responses will, or will not, prompt further action by the FCA firms are likely to strive for a higher standard of compliance in the

first place. Again the Commissioner accepts that if disclosing this information is likely to have this affect the exemption would be engaged.

26. Having viewed the withheld information the Commissioner is satisfied that the majority of it does discuss either the situations in which attestations should be used or the circumstances that would give rise to the FCA taking further action. He is therefore satisfied that disclosing this information would prejudice the effective use of attestations as a means of supervising the financial services market and determining whether more formal regulatory action is warranted.
27. However the Commissioner also finds that in respect of a limited amount of the withheld information, the FCA has not demonstrated that the prejudice would be likely to occur. The remainder of this information does not deal with the ways in which attestations should be used, but is more to do with the risks involved in the use of this supervisory tool. This very limited information is identified in a confidential annex which has been provided solely to the FCA. This information should be disclosed.

### **Public interest**

28. Section 31 is subject to the public interest test as set out in section 2 of the FOIA. The test provides that even where an exemption is engaged the information can only be withheld if the public interest in maintaining the exemption is greater than the public interest in disclosing the information.
29. The Commissioner will first look at the public interest in disclosing the information. The FCA has recognised that there is a public interest in it being open and transparent about the merits or possible disadvantages of regulatory tools such as attestations. It understands that such transparency increases its accountability and could facilitate informed comments on how the FCA performs its regulatory functions. This in turn could lead to improvements in the way it operates.
30. The Commissioner agrees with this position. In particular having viewed the information he notes that some of the exempt information does discuss the risks involved in the use of attestations together with the strategic reasons for adopting the policy. Unlike the information referred to at paragraph 27 above, this information cannot be meaningfully separated from the rest of the guidance on when and how to use attestations. Although this information engages the exemption, the public interest in disclosing this information is stronger than it would otherwise be.

31. During a telephone call the complainant raised concerns that it was difficult for firms within the financial services industry to comply with the rules they were expected to follow if they did not know what those rules were. The Commissioner agrees that it would be inherently unfair to operate a regulatory regime in which someone could be penalised for not pursuing a course of action if they were not aware what actions they were expected to take. Although the complainant did not expand on their argument, the Commissioner can see how such uncertainty could be disruptive to the industry.
32. However complying with an attestation is not itself a requirement of the legislation controlling the financial services industry. They are simply a means by which the FCA can obtain an undertaking to comply with the legislation or gather information on a firm's compliance. The actual requirements and standards which have to be complied with are set down in the legislation itself or elsewhere. Therefore the Commissioner does not give any great weight to this argument.
33. In favour of maintaining the exemption the FCA has argued that it is important that attestations remain a flexible supervisory tool. It is important, the FCA claim, that supervisors continue to be free to use the tool as they judge best. Disclosing the information could severely undermine their ability to do so, as it would lead to, what the FCA describe as, satellite arguments over why one supervisory tool was used and not another. This would inhibit the supervisor's discretion over when to use attestations and could lead to their overuse. This in turn would make it more likely that firms would start to predict when attestations would be used in preference to more formal regulatory measures. The Commissioner is satisfied of the value in firms remaining uncertain about how attestations will be used.
34. The Commissioner is also satisfied that the uncertainty over what the FCA would deem acceptable in terms of complying with an attestation is likely to push up compliance standards. Clearly there is a public interest in the financial services industry operating to high standards. Currently the use of attestations is an effective and resource efficient means of achieving this. Therefore the Commissioner places weight on the value of maintaining the exemption in order preserve the effectiveness of this supervisory tool.
35. In light of this the Commissioner finds that in respect of the information which engages the exemption, the public interest favours maintaining the exemption and should be withheld.

## Other matters

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36. The complainant has also raised concerns regarding the conduct of the internal review. The FCA is unusual in that each member of its Board is authorised to act as a qualified person for the purpose of applying section 36. In particular the complainant was concerned that the qualified person who carried out the internal review was the same individual who applied section 36 when the request was first refused. This was not in accordance with the procedure published on the FCA's website for handling such internal reviews. Furthermore the complainant considered that because of the role performed by the chosen qualified person he had a self interest in the withholding of the information.
37. The FCA has explained to the complainant that the procedures available from its website were out of date. In fact the procedures related to those of its predecessor, the Financial Services Authority, which it only took over from in April 2013. The Commissioner finds this a plausible explanation.
38. Importantly there is no statutory requirement for a public authority to provide an internal review procedure. Therefore where a public authority does provide one the Commissioner has no authority over of how those reviews are conducted. He does however expect the majority of public authorities to provide an internal review and would certainly expect a public authority of the significance of the FCA to have such procedures. Furthermore where a public authority does provide internal reviews the Commissioner would expect them to be carried out in accordance with the code of practice issued under section 45 of the FOIA. As a general rule the code of practice states that, wherever practicable, reviews should be carried out by someone senior to the original decision maker. In any event the process should allow a full re-evaluation of the original decision to refuse a request.
39. The exemption provided by section 36 is potentially very wide ranging and therefore its application is only entrusted to senior staff, who are appointed as a qualified person. Therefore it is often not practical for someone other than the original decision maker to review the application of section 36 at the internal review stage. Indeed, many public authorities only have one officer appointed to act as a qualified person. Furthermore the Commissioner can understand that where there are a number of individuals authorised as a qualified person, the one with the most relevant experience of the issues raised by the request would be chosen to consider the application of section 36.
40. The Commissioner therefore finds he has no grounds to criticise the way the FCA conducted its internal review on this occasion. However as the



FCA is in the fortunate position of having a number of officers who can act as the qualified person, the Commissioner would encourage it to take advantage of this position and where section 36 cases are reviewed in the future to consider whether there is the opportunity for another qualified person to conduct that review.

## Right of appeal

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41. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

42. 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.
43. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**