

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 July 2014

**Public Authority:** Financial Conduct Authority  
**Address:** 25 The North Colonnade  
Canary Wharf, London, EH14 5HS

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to a proposed share offer for Dunfermline Athletic FC Limited.
2. The Commissioner's decision is that the Financial Conduct Authority (FCA) has correctly applied section 44(1)(a) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

#### Request and response

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4. On 7 August 2013, the complainant wrote to FCA and requested information in the following terms:  
*"Our query is, what was the specific point which was raised with you about the share issue document as to its non-compliance? Did you have any specific evidence, or was your letter of 18<sup>th</sup> based on hearsay? We are simply seeking details of the data provided to you in the first place and whether it related to the presentation of the risk factors (ie text against a clear background) which was the only change you required us to make to the document upon FCA's own review."*
5. FCA responded on 4 September 2013. It refused to provide the requested information citing section 44 of the FOIA as its basis for doing so.
6. Following an internal review FCA wrote to the complainant on 6 December 2013 and maintained its original position.

## Scope of the case

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7. The complainant contacted the Commissioner on 13 March 2014 to complain about the way her request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the FCA has correctly applied section 44(1)(a) of the FOIA as to the withheld information.
9. Further information is detailed in a separate confidential annex which has not been disclosed to the complainant.

## Reasons for decision

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10. Section 44 FOIA provides that:

*"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-*

*(a) is prohibited by or under any enactment,*

*(b) is incompatible with any Community obligation, or*

*(c) would constitute or be punishable as a contempt of court."*

11. The FCA has explained that the information that falls within section 44(1)(a) is information received by the FCA for the purposes of or in the discharge of its functions under section 348 of the Financial Services and Markets Act 2000 (FSMA).

12. Section 348(1) of the FSMA states that –

*"Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of –*

*(a) the person from whom the primary recipient obtained the information; and*

*(b) if different, the person to whom it relates.*

13. The operation of the statutory bar is dependent on the consideration of the following issues; firstly, whether the FCA can be classified as a primary recipient, secondly, whether the request is for 'confidential information' and if so, thirdly, whether there is consent to the release of the information or whether this could be obtained.

*Is the FCA a primary recipient?*

14. A primary recipient is defined at section 348(5) of the FSMA and includes the FCA. The Commissioner therefore accepts that the FCA is a primary recipient for the purposes of the FSMA.
15. The Commissioner accepts the FCA's application of section 44 to the withheld information on this basis.

*Is the information "confidential"?*

16. Section 348 also defines confidential information for the purposes of the legislation. That is, information that relates to the business or other affairs of any person, was received by the primary recipient for the purposes of, or in the discharge of, any of the FCA's functions and has not already been made available to the public.
17. The Commissioner has been advised by the FCA that it had not obtained consent for the information to be disclosed. It explained that disclosure of any such confidential information, without the consent of the provider of the information, is in breach of section 348 of FSMA and is a criminal offence. FCA further stated that it was clear from section 348(1)(a) and (b) of FSMA (as well as other information it holds) that it would not be enough for it to obtain the consent of the source of the information. It would also need the consent of other third parties named in the information.
18. It is therefore left for the Commissioner to decide whether the withheld information satisfies the definition of confidential information set out in FSMA. If so, the information will be exempt information under section 44 of FOIA.
19. There is no doubt that the information requested relates to the business or other affairs of any person, as required under section 348 of FSMA. Furthermore, the Commissioner is satisfied that should the information be found to have been received by the FCA, it would have been received for the purposes of discharging the FCA's function of regulating the financial services and markets in the UK. The key question therefore is whether the information was *received* by the FSA as the primary recipient.
20. A dictionary definition of 'received' connotes something acquired by one party from another. In considering whether the withheld information could reasonably be said to be *received*, the Commissioner has initially found it helpful to refer to his experience of the application of section 41 (information provided in confidence) of FOIA. This section also covers the issue of *receiving* information, albeit in the specific context of a public authority *obtaining* information from a third party.

21. The Commissioner appreciates that what constitutes *received* information for the purposes of FSMA is not necessarily clear cut.
22. In his decision on FS50218346, which involved the FSA and the application of section 44, the Commissioner acknowledged that it may not always be immediately obvious whether information could be said to be received. For example, he recognised that in negotiations involving discussions going backwards and forwards between the FSA and a third party, the origin of recorded information may be obscure. Therefore, to enable him to reach a decision on whether section 44 of FOIA was engaged, he considered the intention of the authors of the prohibition set out at section 348 of FSMA: "19. [...] *Having examined the wording of section 348 of FSMA, the Commissioner notes it applies a deliberately wide definition of what constitutes "confidential information" that may not be disclosed. The definition in section 348 of FSMA does not apply any restriction to when the information was "received" or whether it has been processed once already by the FSA and is being used for the second time [...]*"
23. The Commissioner has reviewed the withheld information and it is clear that it has been provided to the FCA confidentially. The Commissioner is therefore satisfied that the withheld information falls within the definition of confidential information contained in section 348 of FSMA.
24. The Commissioner has not been provided with any evidence that indicates the withheld information has been made available to the public in circumstances which would mean the information was not confidential under section 348(4) of FSMA.
25. The Commissioner has therefore decided that the withheld information is exempt information under section 44 of FOIA by virtue of section 348 of FSMA.

## Right of appeal

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26. 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)

27. 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.
28. 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**