

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 April 2017

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 correspondence between the Financial Conduct Authority (FCA) and the Financial Ombudsman Service (FOS) relating to a complaint from a named individual.
2. The Commissioner's decision is that the exemption at section 40(5) FOIA is applicable and therefore the FCA can neither confirm nor deny if the requested information is held as to do so would be a disclosure of personal data. She requires no steps to be taken.

Request and response

3. On 28 April 2016, the complainant wrote to the FCA and requested information in the following terms:
"We request disclosure of the following documents touching or concerning [named individual's] complaint:
 - (1) All letters and emails written from or to the FCA to or from FOS;
 - (2) All file notes recording any conversations between officers of the FCA and FOS;
 - (3) All submissions made by the FCA to FOS;
 - (4) All internal memoranda dealing with any communication between officers of the FCA and FOS.

4. In May 2016 the FCA responded. It refused to confirm or deny whether it held the requested information.
5. The complainant requested an internal review on 4 July 2016. The FCA sent the outcome of its internal review on 20 September 2016.

Scope of the case

6. The complainant contacted the Commissioner on 1 June 2016 to complain about the way his request for information had been handled.
7. The Commissioner has considered whether the FCA can neither confirm nor deny whether the requested information is held under section 40(5) FOIA.

Reasons for decision

Section 40(5)

8. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) of the FOIA to tell the requester whether it holds the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a "neither confirm nor deny" response.
9. Section 40(5) of FOIA sets out the conditions under which a public authority can give a "neither confirm nor deny" response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
10. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.
11. There may be circumstances, for example requests for information about investigations or complaints, in which simply to confirm whether or not a public authority holds that personal data about an individual can, itself, reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not involved in a complaint or investigation. If to do so would contravene data protection principles, for example because it would be unfair, then

the public authority is not obliged to confirm or deny that it holds the information.

If held, would the information be personal data?

12. The Commissioner has first considered whether the requested information would be the personal data of any person.
13. The Data Protection Act 1998 (DPA) categorises personal data as data that relates to a living individual from which that individual can be identified. If held, the information would relate to the fact that a named individual is involved in a complaint with the FCA and FOS.
14. Therefore, the Commissioner is satisfied that the requested information would be personal data. If held, it would tell the public something about the individual, namely whether or not the person had a complaint with the FCA and the FOS.

Would confirming or denying the information is held breach any of the data protection principles?

15. If confirming or denying whether the information is held would contravene the first data protection principle, that personal data should be processed fairly and lawfully, section 40(5)(b)(i) is applicable.
16. In assessing fairness, the Commissioner considers the reasonable expectations of individuals concerned and what might be the likely consequences resulting from disclosure.
17. In this case confirming or denying whether the information is held would communicate whether or not a complaint was held from the named individual.
18. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects whether the public authority holds or does not hold the information.
19. The FOIA is motive and applicant 'blind', and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore an authority can only disclose or confirm or deny it holds information under the FOIA if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it.

20. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard.
21. Complaints are brought to the FCA and the FOS with an expectation of confidentiality. The Commissioner therefore considers that confirming or denying if the information is held in this case could lead to an intrusion into the private life of the individual concerned. Confirming or denying if correspondence between the FCA and the FOS is held would confirm or deny if a complaint from a named individual exists and would be unfair as it may cause that individual some distress given the confidential nature of the complaint investigations.
22. In conclusion, the Commissioner is satisfied that confirming or denying that the requested information is held would be unfair and thus contravene the first data protection principle. Therefore the Commissioner finds that the FCA is entitled to refuse the request on the basis of section 40(5)(i)(b) of the FOIA.
23. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 conditions is met.

Right of appeal

24. 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

25. 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.
26. 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

Gemma Garvey
Senior Case Officer

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