

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 June 2017

**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 information relating to a decision made by the FCA not to investigate a named company. The FCA refused to confirm or deny whether the requested information was held under section 31(3) and 43(3) FOIA.
2. The Commissioner's decision is that the FCA has correctly applied section 31(3) FOIA in this case.
3. The Commissioner requires no steps to be taken.

### Request and response

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4. On 25 April 2016 the complainant requested information of the following description:

Request 1 The material considered by [named individual] which formed the basis for [named individual's] statement in a letter dated 2 June 2015 to [named individual] of [named company] that "we made our decision not to investigate [named company] in accordance with our published referral criteria with reference to all available material to us". [named individual's] letter was in response to a detailed letter from [named individual] dated 15 May 2015.

Request 2 The material considered by [named individual] which formed the basis for [named individual's] confirmation in a meeting on 23 June 2015 with [named individual] (and others) that "the regulator had reviewed the Eder judgement and had chosen not to initiate an investigation into the UK regulated arm of [named company], despite FCA's well publicised strategy of preventing the type of conduct which was identified in the judgement.

Request 3 The material considered by [named individual] and/or [named individual] which formed the basis for [named individual's] statement in her letter to [named individual] dated 7 October 2015 (copied to [named individual]) that the FCA had "carefully considered the additional material you have provided and the request at paragraph 2 of your letter, we have reviewed our decision not to investigate [named company] in relation to specific matters concerning the fraudulent events in 2010/2011 referred to above and decided that our original decision not to investigate remains appropriate". The letter was in response to a detailed letter from [named company] to [named individual] of FCA dated 14 August 2015.

5. On 17 May 2016 the FCA responded. It refused to comply with the request under section 12 FOIA.
6. The Commissioner has been made aware that the complainant remade this request in July 2016 and the FCA responded along the same lines.
7. The complainant requested an internal review on 18 October 2016. The FCA sent the outcome of its internal review on 22 December 2016. It withdrew its application of section 12 but confirmed that it was not obliged to confirm or deny whether the requested information was held under section 31(3) and 43(3) FOIA.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 23 March 2017 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the FCA was correct to apply section 31(3) and 43(3) FOIA in this case.

## Reasons for decision

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10. The FCA has argued that it is not obliged to confirm or deny whether it holds the requested information under section 31(3) FOIA as to do so would or would be likely to prejudice the exercise by any public authority of its functions by virtue of section 31(g) with subsection 31(2) FOIA.
11. The purposes that the FCA has argued would be likely to be prejudiced if the information was disclosed are the following within section 31(2):
  - subsection (a) the purpose of ascertaining whether any person has failed to comply with the law,
  - subsection (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
  - subsection (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise and;
  - subsection (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on.
12. As with any prejudice based exemption, a public authority may choose to argue for the application of regulation 31(1)(g) on one of two possible limbs – the first requires that prejudice 'would' occur, the second that prejudice 'would be likely' to occur.
13. The FCA has stated that it believes the likelihood of prejudice arising through confirming or denying whether the requested information is held is one that is likely to occur, rather than one that would occur. While this limb places a weaker evidential burden on the FCA to discharge, it still requires the FCA to be able to demonstrate that there is a real and significant risk of the prejudice occurring.
14. The Commissioner has first considered whether the FCA is formally tasked with any of the functions set out in section 31(2)(a)-(d). The FCA explained that under part XI of the Financial Services and Markets Act 2000 (FSMA) that FCA has the functions (among others) of monitoring a firm's compliance with its requirements and of inquiring into, investigating and, if appropriate, taking action in relation to conduct of the firm's it regulates.
15. In this case the Commissioner is satisfied that the FCA has been formally tasked with the functions set out within section 31(2)(a)-(d) FOIA.

16. The Commissioner has therefore gone on to consider how confirming or denying whether the requested information is held would be likely to prejudice these functions.
17. The FCA explained that the harm to its functions of ascertaining or monitoring compliance with its regulatory requirements would be likely to occur for a number of reasons. The first is if it were investigating or be about to investigate a firm's conduct (which it has neither confirmed nor denied in this case), public disclosure of that fact could prejudice the efficient and effective carrying out of that investigation. It could also make the firm concerned more defensive or allow those persons connected or potentially connected to the investigation to take steps to alter, conceal or destroy relevant records.
18. Secondly, it went on that over time (as opposed to during an ongoing investigation) because public disclosure of the fact of an investigation would be regarded as undermining the fairness of the enforcement process, this would impact on the co-operation of firms with the investigation procedure. It said that this would hamper the effective discharge of the enforcement function, especially given firms' expectation that the FCA does not customarily disclose such information, and that disclosure under FOIA is disclosure into the public domain (not just to interested parties).
19. Finally it said that the FCA does not routinely publish its views in relation to the conduct of the firms it regulates until a final decision to take enforcement action has been made (which it is neither confirming nor denying in this case) and even then it may not disclose this information if it would be unfair to do so. It said that this is in line with its duties under the FSMA and in line with the FCA's policies.
20. The Commissioner considers that the FCA is formally tasked with the functions set out in section 31(2)(a)-(d) FOIA. Its ability to fulfil these functions effectively is dependent upon the involved parties willingness to voluntarily supply and openly share information to assist with an FCA investigation, the enforcement process being fair and that information relating to investigations is not routinely disclosed into the public domain unless and until a decision has been reached to take enforcement action and then only if it would be fair to do so in line with the FCA's obligations under the FSMA. Whilst the Commissioner considers that the FCA has powers to compulsorily obtain information for an investigation, it is a well-established principle that such a process is far more effective if parties openly volunteer as much information as possible relevant to the investigation.

21. The Commissioner therefore accepts that confirming or denying whether the requested information is held would be likely to result in the prejudicial effects to the FCA's purposes described at sections 31(2)(a)-(d) of FOIA. As section 31(3) is a qualified exemption, the next step is for the Commissioner to consider whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

## **Public interest test**

### **Arguments in favour of disclosing the information**

22. 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. However the FCA went on that it has a number of policies and structures in place to ensure that it and the firms and individuals it regulates are compliant with the legislation under which it operates, in particular the FSMA. As such, it considers that there are sufficient safeguards and public accountability to ensure that the FCA is exercising its functions appropriately, fairly and proportionately. The FCA also already makes available a substantial amount of information to enable firms, consumers and the FCA's key stakeholders to understand how it operates and what can be expected of it in return. Where any formal regulatory action is taken against a firm or an individual the public is (save in exceptional circumstances) is informed of the final outcome of the proceedings via the FCA website, its public statements and may be widely reported in the press. It said that this serves to promote the public interest in transparency of regulatory action, in accordance with due legal process.

### **Arguments in favour of maintaining the exemption**

23. The FCA considers that there is a strong public interest in not confirming or denying whether information is held where it would be likely to increase the risk of firms' misconduct not being detected and would undermine its market integrity and consumer protection objectives. It went on that it is not in the public interest to hamper the voluntary supply of information between itself and the firms it regulates.

## **Balance of the public interest**

24. The FCA concluded that it is in the public interest that it is afforded space in which to carry out its regulation of the financial services sector unhindered and in not confirming or denying whether it holds information which could harm certain aspects of that regulation.
25. The Commissioner considers that there is a strong public interest in the FCA operating openly and being accountable in its effectiveness in carrying out its statutory functions. The Commissioner understands that the complainant has private interests in the withheld information, however this cannot be confused with the wider public interest.
26. The Commissioner does consider that there is a strong public interest in not confirming or denying whether information is held where this would be likely to impede the FCA's ability to carry out its functions effectively. Therefore confirming or denying whether the requested information is held, which would be likely to frustrate the voluntary flow of information, would not be in the public interest.
27. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 31(3) FOIA was correctly applied in this case to the requested information. The Commissioner has not therefore gone on to consider the application of any other exemption any further.

## Right of appeal

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

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

29. 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.
30. 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**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**