

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

### **Decision notice**

**Date:** 4 June 2021

**Public Authority:** Financial Conduct Authority  
**Address:** 12 Endeavour Square  
London  
E20 1JN

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

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1. The complainant has requested copies of correspondence sent to a particular company. The Financial Conduct Authority ("the FCA") refused to confirm or deny holding information, relying on section 43 (commercial interests) and section 44 of the FOIA (statutory prohibition) to do so.
2. The Commissioner's decision is that the FCA was not entitled to rely on either section 44(2) or section 43(3) of the FOIA to neither confirm nor deny holding relevant information. As the FCA also failed to complete its public interest considerations within a reasonable timeframe, it breached section 17(3) of the FOIA.
3. The Commissioner requires the FCA to take the following steps to ensure compliance with the legislation.
  - Either confirm or deny holding information within the scope of the request. If the FCA holds information it must either disclose it, or issue a refusal notice that complies with section 17 of the FOIA.
4. The FCA 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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5. On 31 March 2020, the complainant wrote to the FCA and requested information in the following terms:

*"....the instructions that the FCA insisted that Guinness Mahon the Pension Trustee send to all the AIGO investment clients..."*

6. The FCA first responded on 30 April 2020. It noted that the effect of confirming or denying that information was held would be likely to prejudice the commercial interests of Guinness Mahon and that it would be entitled to rely on section 43 of the FOIA to refuse to issue a confirmation or a denial that information was held. However, it noted that section 43 is a qualified exemption and stated that it needed additional time to consider the balance of the public interest in issuing a confirmation or a denial. Further, similar, letters were issued on 1 June, and 29 June 2020.
7. On 8 July 2020, the FCA issued its formal response. It maintained that it was entitled to rely on section 43 to refuse to confirm or deny holding information and it believed that the balance of the public interest fell in favour of maintaining the exemption. However it also noted that it was entitled to rely on section 44(2) of the FOIA to refuse to confirm or deny holding information as issuing a confirmation or a denial would, in itself, involve disclosing information classed as "confidential information" for the purposes of the Financial Services and Markets Act 2000 (FSMA) – which prohibits disclosure of such information.
8. The complainant sought an internal review on 10 July 2020. He argued that he already knew that the correspondence existed and he required copies to take part in litigation relating to insolvency.
9. Following an internal review the FCA wrote to the complainant on 7 August 2020. It upheld its original position.

## Scope of the case

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10. The complainant contacted the Commissioner on 10 August 2020 to complain about the way his request for information had been handled.
11. On 29 March 2021, the Commissioner wrote to the complainant, setting out her provisional view of the complaint. She pointed out that, even if the FCA did hold the correspondence that had been requested, that correspondence would undoubtedly contain "confidential information" for the purposes of the FSMA and therefore, even if the FCA were to issue a

confirmation or a denial, the complainant would be very unlikely to be entitled to receive any information.

12. The complainant did not accept the Commissioner's conclusion. He reiterated that he and other investors were already aware that the correspondence did exist. He emphasised that Guinness Mahon had written to over a thousand of its investors, apparently on instruction from the FCA. He wanted to know what those instructions were and whether they were associated with any "threats" from the FCA. He asked the Commissioner to issue a decision notice.
13. For clarity, the Commissioner's task is only to determine whether the FCA was or was not entitled to refuse to confirm or deny holding information within the scope of the request.
14. Having reviewed the FCA's initial submissions, the Commissioner was not satisfied that they focused sufficiently on the effect of issuing a confirmation or a denial that information was held. She also noted that, whereas the FSMA prevents the release of information *received* by the FCA, in the present case, the request sought correspondence *sent* by the FCA – which would, on the face of it, not be covered by a statutory bar on disclosure. She also asked for more detailed submissions in relation to section 43(3) of the FOIA, given that the party whose commercial interests the FCA wished to protect had been placed into administration at the time the request was responded to.
15. The FCA provided further submissions on 27 May 2021 in which it stressed the effect that issuing a confirmation or a denial in this case would have on its regulatory work in general. Given this line of argument, the Commissioner is somewhat surprised that the FCA has, at no point during the investigation, attempted to rely on section 31(3) of the FOIA (which can be used where issuing a confirmation or a denial would impede the work of a regulator) – despite having done so in the past.
16. As the FCA had, at that point, been given two opportunities to explain its position and is clearly aware of the circumstances in which section 31 may be relied upon, the Commissioner considered that it would be unfair to the complainant to seek any further submissions. It is the FCA's responsibility to identify any relevant exemptions and it is the Commissioner's job to determine only whether those exemptions cited have been correctly relied upon. It is not the Commissioner's responsibility (except where personal data is concerned) to decide what exemptions *ought* to have been relied upon.

17. Given that section 44 of the FOIA is an absolute exemption, the Commissioner has looked at this exemption first. Only if it is not engaged, will she look at section 43.
18. For the avoidance of doubt, whilst the FCA did confirm, to the Commissioner, its true position in respect of this request, nothing in this notice should be taken as inferring that the FCA did or did not hold information at the time of the request.

## **Reasons for decision**

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### Section 44 – Statutory Prohibition on Disclosure

19. Section 1(1) of the FOIA states that:

*Any person making a request for information to a public authority is entitled –*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

20. Section 44(1) of the FOIA provides an exemption from disclosure for any information whose disclosure would either be otherwise prohibited by another piece of legislation or which would constitute a contempt of court.
21. Section 44(2) of the FOIA provides an exemption from the duty to confirm or deny whether information is held if the mere act of confirming or denying alone would involve the disclosure of information which was otherwise prohibited.
22. Section 348(1) of the FSMA prevents the FCA from disclosing “confidential information” without consent.
23. Section 348(2) of the FSMA states that:

*“confidential information” means information which—*

- (a) relates to the business or other affairs of any person;*
- (b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the FCA, the PRA or the Secretary of State under any provision made by or under this Act; and*

- (c) *is not prevented from being confidential information by subsection (4).*

24. Section 348(4) of the FSMA states that:

*Information is not confidential information if—*

- (a) *it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or*
- (b) *it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.*
25. Section 349 provides some limited gateways to disclosure of confidential information, none of which relate to disclosure to the world at large.
26. Section 352 of the FSMA makes it a criminal offence to disclose confidential information otherwise than in accordance with the FSMA..
27. The task for the Commissioner is to determine whether the mere fact that the FCA sent or did not send correspondence to Guinness Mahon is, in itself, confidential information and thus covered by the FSMA.

#### *The complainant's position*

28. In seeking a decision notice, the complainant argued that:

*"There are no commercial sensitivities in this regard and this excuse has been used by the FCA in the past. It is simply the FCA protecting an Employee who decided, for whatever reason, to instruct Guinness Mahon (GM) the Pension Trustee (now in Administration) to write to all the AIGO Clients and incorrectly inform them all that the Funds were Illiquid, Non-Standard and High Risk. This direction was put to GM under the threat of closure...*

*"...I have provided evidence of the criminal act to both the Law Enforcement Agencies along with full details to the Complaints Commissioner. Should you require the specific details of my meetings and taped audio calls with Directors of Guinness Mahon please feel free to request these in writing from me. These evidence the blackmail that has taken place in this regard."*

#### *The FCA's position*

29. The Commissioner asked the FCA to provide a submission focusing on the narrow issue of the duty to confirm or deny that information was

held and whether the existence (or not) of correspondence would, in itself, be confidential information.

30. The FCA's initial submission contained numerous issues. Firstly, it wrongly conflated the actual wording of the original request with the way that the complainant described the information when he sought an internal review.
31. In his request for an internal review, the complainant stated that the FCA had:

*"instruct[ed] Guinness Mahon (GM) the Pension Trustee (now in Administration) to write to all the AIGO Clients and incorrectly inform them all that the Funds were Illiquid, Non-Standard and High Risk. This direction was put to GM under the threat of closure."*
32. The FCA argued that, if it were to issue a confirmation or a denial that information were held, it would potentially be confirming not just the existence (or not) of the correspondence but also confirming, to a large extent, the content or nature of that correspondence.
33. Secondly, the FCA's submission focused in large part on what the requested information (if it existed) might or might not contain and whether the FCA would be justified, hypothetically, in relying on section 44 to withhold such information (if, in fact, it did hold it). However, the question in this case is not what any hypothetical information might reveal, but what the FCA would reveal to the world at large if it were to simply confirm or deny that it held information within the scope of the complainant's original request.
34. The FCA initially advanced two lines of argument that are pertinent to the question of whether it should issue a confirmation or a denial that it held relevant information.
35. Firstly, it noted that, given that financial markets are highly sensitive to information, it needed to be circumspect about where and when it had exercised its regulatory powers – both formal and informal. Whilst the FCA noted that it did publish details where it had exercised its more draconian regulatory powers, if a company had been provided with informal advice, the FCA would not draw attention to this fact. Confirming that some form of regulation-related conversation had taken place would be likely to indicate to the markets that there was some form of "culpability" on behalf of that company – even if that was not the case. It noted that the FSMA was designed to promote the free flow of information between the regulated and the regulator – and that its importance had been upheld by the Tribunal and senior courts.

36. Secondly, the FCA argued that, if it were (hypothetically) to confirm that it held information, even though the correspondence would have emanated from the FCA itself, it would be disclosing confidential information that would be embedded within that correspondence. It referred specifically to the judgement in *Landau v Information Commissioner & FCA EA/2013/0098* as supporting its position. If, hypothetically, the FCA held no information, a neither confirm nor deny response would still be appropriate so as to avoid the inconsistency undermining the use of the exemption (ie. if the FCA were only to use a neither confirm nor deny response where it held information, this would quickly become obvious).
37. When challenged by the Commissioner to consider the specific effects of issuing a confirmation or a denial and what information would be disclosed that had been *received* by the FCA, the FCA advanced two further lines arguments.
38. Firstly, it argued that, if it were to confirm that it held information within the scope of the request (if in fact it did), it would be confirming that it had received information showing a relationship between Guinness Mahon and AIGO clients – which would, it argued, be confidential information.
39. Secondly, the FCA argued that, if it had issued “instructions” as the request suggests, it was logical to assume that it must have been acting on information it had “received”:

*“In this respect, the Information Commissioner has previously recognised that some information when taken in isolation is not likely to be harmful on its own but may be harmful when combined with other information already in the public domain or known to a limited group of people; sometimes known as a “mosaic” or “jigsaw” effect. We believe that public bodies, such as the FCA, are therefore entitled to look at the effect of the proposed disclosure (and in this case, the confirmation or denial of whether we wrote to GM in the terms of the information requested) in the context of any existing information already in the public domain or known. This might be, for example, by allowing third parties to build up a bigger picture of our regulatory approach to issues on the subject matter of the request and allowing them, or others, to develop an understanding of how to manipulate our existing processes and systems (or those of other third parties) for their own ends. We believe this is the case here.*

*“In addition, if firms, individuals or other third parties became aware that the fact of the existence of information, obtained or created as part of our regulatory functions, may be confirmed under*

*the FOIA they may be less willing to work with us on a voluntary basis in the future. It is therefore vitally important that the FCA is allowed to carry on its regulation of the financial services sector unhindered."*

*The Commissioner's view*

40. The Commissioner recognises the FCA's (justified) keenness to protect its regulatory abilities. However, this exemption does not exist to protect regulatory functions, it exists to protect public authorities from violating other pieces of legislation which override the FOIA. If a public authority is unable to demonstrate that the identified statutory bar would prohibit the issuing of a confirmation or a denial, section 44 is not engaged – no matter how damaging issuing a confirmation or a denial might cause.
41. Many regulators (including the Commissioner herself) are subject to special legislation to help them go about their work. This legislation allows the regulator to receive information that the organisations they regulate would not normally wish to share with third parties (usually because of commercial considerations) and may give the regulator the power to compel an organisation to hand over information.
42. The corollary of this privileged access to information is that the regulator is required to keep the information it collects confidential. Its staff are not permitted to disclose the information except through prescribed "gateways" to disclosure (usually related to criminal or civil judicial proceedings) and any unauthorised disclosure is a criminal offence.
43. When determining whether or not section 44 is engaged in respect of a confirmation or a denial, the Commissioner must perform a three-step test:
  - a) Identify the relevant legislation introducing the statutory bar.
  - b) Determine whether issuing a confirmation or a denial would disclose information which would be subject to the statutory bar.
  - c) Consider whether there is a gateway that would allow a confirmation or denial to be issued.
44. The Commissioner accepts that the FSMA is relevant in this case as it is the FCA's governing the legislation and does prohibit the disclosure of "confidential information."
45. However, the Commissioner does not consider that issuing a confirmation or denial in this case would engage the statutory bar.



46. When determining whether a statutory bar requires a neither confirm nor deny response, the Commissioner is not required to consider what the hypothetical contents of any information that existed might be (if in fact the information existed). Her role is to determine whether the mere act of issuing a confirmation or a denial that information is held would *in itself* result in the disclosure of information that would engage the statutory bar.
47. The original request asked
- "...can you please supply the instructions that the FCA insisted that Guinness Mahon the Pension Trustee send to all the AIGO investment clients, including myself as an investor."*
48. It is this information that the FCA is being asked to confirm or deny that it holds. Therefore in issuing a confirmation or a denial, the FCA is in effect being asked to say either:
- a) That it did issue instructions to Guinness Mahon that were to be passed on to AIGO investors
  - b) That it did not issue instructions to Guinness Mahon that were to be passed on to AIGO investors
49. In issuing a confirmation or a denial, the FCA is not being asked to confirm what the nature of any instructions it issued were; it is not being asked to explain why those instructions were necessary and it is not being asked to explain (if it were to deny holding information) why it did not issue instructions. It is only being asked to confirm whether instructions, that were to be passed on, were or were not issued.
50. The Commissioner does not accept that by merely confirming that it held information (if indeed that is the FCA's true position) the FCA would be disclosing any "embedded" confidential information as a confirmation would not in itself reveal anything about the nature of the instructions or the reasons why such instructions were necessary. In short, it would not reveal any information the FCA has received from another party – if indeed it had received any information.
51. The FCA's arguments about why it might need to issue instructions are, in the Commissioner's view, speculative. The FCA might be acting on information from Guinness Mahon, it might be acting on a tip-off or whistleblowing type disclosure, or it might be acting on its own research and due diligence using sources already in the public domain. Issuing a confirmation (or a denial) would not confirm that it had (or that it hadn't) received any information from a third party. Given that this particular statutory bar forms part of a criminal offence, the Commissioner is not convinced that an individual could be successfully

prosecuted if it could not be proved beyond doubt that the information disclosed without authorisation had been received from a third party.

52. The *Landau* case does not assist the FCA. That case considered an item of correspondence that the FCA had already confirmed that it held. The question in *Landau* was whether a piece of correspondence, sent by the FCA, nevertheless contained confidential information. The Tribunal found that the confidential information (ie. what the FCA had received) was so intertwined with the other correspondence that it was not possible to separate the two and therefore the entire correspondence was confidential. This case is different. The FCA has not confirmed that it holds any information so speculation as to what the information (if it existed) might contain is irrelevant.
53. Whilst the Commissioner accepts that the fact that Guinness Mahon had a relationship with the AIGO fund might be information that the FCA has received, she also notes several web articles, dating from 2019, noting this relationship – particular amongst legal firms offering to handle mis-selling claims.<sup>1</sup> The Commissioner therefore considers that this information was already in the public domain at the point that the request was responded to and cannot therefore be “confidential information.”
54. If the FCA were to issue a confirmation that it sent correspondence to Guinness Mahon or that it sent no such correspondence, that might affect its ability to regulate effectively – but it does not reveal any information that the FCA has received. As issuing a confirmation or a denial would not disclose any information the FCA has received (that is not already in the public domain), it follows that such a confirmation or denial would not disclose “confidential information” and therefore the FSMA does not prevent such a confirmation or denial from being issued.
55. As the statutory bar is not engaged, it follows that the FCA is not entitled to rely on section 44(2) of the FOIA.

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<sup>1</sup> See for example:

<https://www.ftadviser.com/pensions/2019/09/10/claims-against-adviser-rise-to-23m/>  
<https://www.hughjames.com/blog/did-you-invest-in-aigo-holdings-plc-%E2%80%9Caigo%E2%80%9D->

## Section 43 – Commercial Interests

56. Section 43(2) of the FOIA states that:

*Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*

57. Section 43(3) of the FOIA states that:

*The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).*

58. The exemption can be engaged on the basis that issuing a confirmation (or a denial) either “would” prejudice commercial interests, or the lower threshold that a confirmation or denial only “would be likely” to prejudice those interests. For the Commissioner to be convinced that prejudice “would” occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of “would be likely to” occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.

59. In the Commissioner’s view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party’s commercial interests to engage the exemption. Nor is it sufficient for the other party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between the issuing of the confirmation (or denial) that information is held and the claimed prejudice. It must specify how and why the prejudice would occur.

### *The FCA’s position*

60. The FCA explained to the Commissioner that:

*“The party whose commercial interests would, or would be likely to be, prejudiced under section 43(3) of the Act...is GM [Guinness Mahon]. At the time of the request the firm was in administration and was subsequently placed in liquidation on 2 February 2021. It was not and is still not yet wound up. At the time of the request it would have continued to have valid commercial interests and may indeed now in the context of the process and objectives liquidation.”*

61. As soon as Guinness Mahon Trust Corporation Ltd had entered administration, the FCA noted, its Self-Invested Personal Pension (SIPP) business had immediately been sold to another fund (“the New Owner”),

but the company still remained as a legal entity at the point the request was responded to and could, in theory, have been resurrected at some point in the future – either through a sale, or by resuming trading.

62. Confirming or denying that it held information within the scope of the request would, the FCA argued, be likely to prejudice the commercial interests of Guinness Mahon because:

*"there would likely be commercial prejudice from any disclosure that we hold (or do not hold) the information requested. We are satisfied that the prejudice being claimed is not trivial or insignificant and that disclosure would lead to the harmful consequences that section 43 of the Act is there to protect. Public disclosure of any opinions, views or judgements of the FCA, could be interpreted negatively by external commentators, which would harm the commercial interests of GM, in circumstances where the firm will not have had an opportunity to comment on those opinions..."*

*"...our experience is that, because of the importance of the reputation of regulated firms operating in the financial sector, if negative information (in any form) were to be disclosed by the FCA, it has been accepted that this could harm the commercial interests of the firm concerned. This may also have a damaging impact on their consumers and other stakeholders."*

63. In addition, the FCA also pointed out that issuing a confirmation or a denial that it held relevant information would be likely to prejudice the commercial interests of the New Owner:

*"if [the New Owner] inherited any potential claims or liabilities. In addition, the transfer of GM's assets and staff to [the New Owner] could potentially lead to negative assumptions being made about the operation of [the New Owner]'s business. Commercial prejudice could therefore occur to them by association with [confirmation or denial]. Furthermore, if individuals wish to continue to invest their pensions through [the New Owner], via the former GM SIPPs, the FCA should not do anything that would damage the reputation of [the New Owner] and so impact on those investors. We are therefore of the view that a prudent approach should be adopted in confirming whether or not the requested information is held."*

*"It would therefore, in our view, not be in the public interest to disclose any information (or provide a confirmation or denial under the FOIA) that would damage the commercial interests of [the New Owner] and thereby undermine the protection for the clients and creditors that is being offered."*

*The Commissioner's view*

64. In the Commissioner's view, the FCA has failed to put forward a convincing argument to explain why there is a real and significant possibility of any party's commercial interests being harmed if it were to issue a confirmation or a denial that it held this information.

65. In assessing the probability of harm occurring, the Commissioner has to look at the situation that prevailed at the time of the request. Guinness Mahon was in administration and its SIPP business had been sold off. The FCA's own statement at the time the company went into administration recorded that:

*"GMTC received complaints about historic high-risk non-standard investments (NSIs) and the lack of due diligence that GMTC had carried out before accepting these NSIs into customers' SIPPs. Following professional advice sought by GMTC about its liabilities arising from existing and potential claims, the Company's directors were advised that GMTC was insolvent and should be placed into administration to provide protection for the clients and creditors."*<sup>2</sup>

66. In October 2020 (albeit after the FCA completed its internal review), the Financial Services Compensation Scheme (FSCS) stated that:

*"We're aware that independent financial advisers recommended many GMTC customers to transfer their existing pensions into a Guinness Mahon SIPP. And that after the transfer, customers had their pension funds placed in high-risk, non-standard investments. Some of these have since become illiquid, which means they can't currently be sold or traded."*<sup>3</sup>

67. Therefore the Commissioner has to take, as her starting point, the fact that it was widely known at the time of the request that Guinness Mahon had entered into administration and that this was likely to have come about, at least in part, because of a lack of due diligence when making investment recommendations to its clients.

68. In the Commissioner's view, even if Guinness Mahon had chosen to resume trading (or if another company had bought the name), the prejudice that would have resulted from the two public statements

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<sup>2</sup> <https://www.fca.org.uk/news/news-stories/guinness-mahon-trust-corporation-limited-administration-and-sipp-business-immediately-sold-hartley>

<sup>3</sup> <https://www.fscs.org.uk/failed-firms/guinness-mahon/>

above would have been far more damaging than anything the FCA could have disclosed by issuing a confirmation or a denial in this case.

69. The FCA has not suggested that issuing a confirmation or a denial that it held information would have affected the ability of the administrators to realise the value of any remaining assets Guinness Mahon still held at the point the request was responded to. Given the status of the company at the time of the request, the Commissioner finds it difficult to accept that Guinness Mahon's commercial interests (inasmuch as it still had any) could be further harmed by merely confirming or denying that it had received correspondence from the FCA.
70. Whilst the Commissioner notes the FCA's broader point about the risks of prejudicing the commercial interests of financial services companies by suggesting that they had done something wrong, she considers that each case must be looked at on the basis of its own individual facts. There is a clear distinction to be drawn between a company that is active and one that has been placed into administration.
71. Similarly, the Commissioner is not persuaded that the New Owner's commercial interests would be prejudiced in the event that the FCA were to confirm or deny holding information within the scope of the request.
72. All the New Owner's existing clients, the clients transferred from Guinness Mahon and any potential new clients would (or, at least, should) have been aware of what had happened to Guinness Mahon. Any significant prejudice to the New Owner's commercial interests would, in the Commissioner's view, have occurred at the point the New Owner decided to purchase assets from a company under a cloud. This is something that the New Owner would have factored into its decision to buy the assets and, if the New Owner had carried out due diligence prior to the purchase, it would have formed its own assessment of any liabilities it might also be taking on.
73. The FCA issuing a confirmation or a denial that it had previously written to Guinness Mahon would be unlikely, in the Commissioner's view, to concern any of the New Owners investors that had not already been concerned by the purchase of the assets in the first place.
74. As the FCA has failed to demonstrate any real and significant harm that would result to the commercial interests of any party from a confirmation or a denial being issued, it follows that the FCA has failed to demonstrate that section 43(3) of the FOIA is engaged and is therefore not entitled to rely on the exemption.

### Procedural Matters

75. Section 10 of the FOIA states that responses to requests made under the Act must be provided "promptly and in any event not later than the twentieth working day following the date of receipt."
76. Section 10(3) of the FOIA states that, where a public authority is considering the balance of public interest, it can extend the 20 working day deadline "until such time as is reasonable in the circumstances."
77. Under Section 17(3) of the FOIA a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to justify the time taken fully.
78. The Commissioner recognises that this request was received during the first Covid-19 lockdown and that, across the public sector, organisations struggled to adapt to new ways of working. Nevertheless, she is obliged to note that the FCA issued its refusal notice in excess of three months after the request would have been received.
79. The FCA has not put forward any arguments to explain what exceptional circumstances prevented it from issuing its refusal notice sooner.
80. In the Commissioner's view it was not "reasonable in the circumstances" for the FCA to take over three months to complete its public interest test considerations and issue a refusal notice.
81. The Commissioner notes that, in order to issue the refusal notice that it did, the FCA did not need to consider any withheld information that might have required redaction. It only needed to consider whether there was a public interest in issuing a confirmation or denial, despite the commercial prejudice it had identified. Given that it considered it had already identified an absolute exemption that would allow it not to issue a confirmation or a denial, it is difficult to see why the FCA needed so much additional time to consider the balance of the public interest with respect to section 43.
82. Secondly, the Commissioner notes, from the FCA's submissions, that a number of extraneous matters (such as what any hypothetical information that was held might reveal) went into its considerations. Had the FCA followed the proper approach to considering a "neither

confirm nor deny" response, it might have been able to complete its deliberations quicker.

83. Finally, the Commissioner notes that, despite taking in excess of three months, the FCA still ended up relying on exemptions she has now found were relied upon incorrectly. She therefore concludes that the FCA's deliberations were not completed within a reasonable timeframe and therefore the FCA breached section 17(3) of the FOIA.

## **Other matters**

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### *Role of the FSCS*

84. In its submissions, the FCA noted that the FSCS was currently assessing claims made against Guinness Mahon for a lack of due diligence. It noted that:

*"the FSCS has concluded that it might be able to compensate customers who invested in GMTC's SIPP business. As a result, the FSCS has started assessing claims against GMTC in relation to its due diligence. The FCA should not therefore take any action which might impact on the FSCS considerations."*

85. The Commissioner agrees that it is important that the FSCS is able to go about its business. Unfortunately the exemptions the FCA chose to rely upon did not allow her to do so.



## Right of appeal

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86. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

87. 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.
88. 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**