

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 November 2022

Public Authority: Crown Prosecution Service
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant has requested information from the Crown Prosecution Service (CPS) in relation to financial crime training for CPS Officers. CPS provided some information in relation to the request, however for the remainder of the request, it advised that it does not hold the requested information. The CPS also advised that it was not required to produce the information for some parts of the request, as they are not asking for recorded information; they are asking for an opinion.
2. The Commissioner's decision is that, on the balance of probabilities, the CPS is correct to confirm that it does not hold the requested information. The Commissioner is also satisfied that the CPS was correct to refuse to provide a response to the parts of the request where the complainant has asked for opinions.
3. The Commissioner does not require the CPS to take any steps as a result of this decision notice.

Request and response

4. On 17 January 2022, the complainant wrote to the CPS and requested information in the following terms:

"FOI request re Financial Crime Training of CPS Officers regarding implications of Financial Services and Markets Act 2000 legislation, authorisation and rules; and the borderline between criminal and civil

liability on mortgage fraud; where documentation shows the mortgage, product is FSA/FCA regulated (meaning the broker and lender have a statutory regulatory duty to comply with FSA/FCA Rules).

[Personal information about complainant]. This was set up following the Financial Services and Markets Act 2000, and the formation of the Financial Services Authority. Final Decisions of the FOS Ombudsman are legally binding on firms once they have been accepted by the customer, as part of DISP (dispute rules) agreed with the regulatory body, the Financial Conduct Authority (FSA to April 2013) Law Society Is the Legal Ombudsman's final decision binding? | The Law Society the Financial Services Authority provided Handbooks to the firms, which were required to be authorised under FSMA 2000. The Handbooks contained Rules shown as (R) and Guidance shown as (G). They are available online Home - FCA Handbook showing a Timeline from 2001 Under FSMA 2000 S138D Financial Services and Markets Act 2000 (legislation.gov.uk) this provides an action for damages at the suit of a private person should a firm contravene their statutory duty to comply with Rules. That means financial firms require authorisation and have a statutory duty to comply with FCA Handbook Rules.

The CPS Fraud Act Charging Practice refers to:

The borderline between criminal and civil liability

The borderline between criminal and civil liability is likely to be an issue in alleged Fraud Act offences particularly those under Section 1. Prosecutors should bear in mind that the principle of caveat emptor applies and should consider whether civil proceedings or the regulatory regime that applies to advertising and other commercial activities might be more appropriate. Not every advertising puff should lead to a criminal conviction but it is also the case that fraudsters prey on the vulnerable. Prosecutors should guard against the criminal law being used as a debt collection agency or to protect the commercial interests of companies and organisations. However, prosecutors should also remain alert to the fact that such organisations can become the focus of serious and organised criminal offending.

I am also aware that there is an NCA Financial Investigators Support System Guide which refers to legal entities. From the above it is 100% clear that CPS officers considering financial crime should be aware of financial services industry legislation, rules, and regulations and that the industry regulator is the FCA. The FCA Register and Disciplinary and Regulatory Record of firms is in the public domain Financial Services Register | FCA.

For information purposes, the College of Policing Training and accreditation (college.police.uk) refers to training of financial investigators. The NCA website refers to training but only in respect of POCA 2002 implications Financial investigation training courses - National Crime Agency. The NCA do not respond to FOI requests, Police officers and required to comply with the College of Policing Code of Ethics, and Core Investigative Doctrine

1. The above information is factual and correct to the best of my knowledge. Do the CPS dispute any point made? This especially applies where it is clear through documentation that a mortgage product has been authorised and regulated by the FSA/FCA and the implications of the Financial Services and Markets Act 2000 legislation, authorisation, and rules (the latter as referred to in FSMA 2000 S138D Financial Services and Markets Act 2000 (legislation.gov.uk)) apply?

2. Do CPS officials receive training to meet the CPS Fraud Act 2006 criteria regarding the borderline between criminal and civil liability, which refers to 'caveat emptor'. What do the CPS consider 'caveat emptor' means in a mortgage case where a broker and lender are involved? (I have not been able establish whether the NCA training refers to any investigation of 'caveat emptor' ie the role of brokers and lenders and their statutory duty to comply with 3 FSA/FCA Rules, as referred to in the CPS Fraud Act 2006 Charging Practice).

3. Do CPS officers involved in financial crime investigations receive training in financial services rules and regulations, including the fact that the Financial Services and Markets Act 2000 legislation, authorisation and rules impact on every aspect of financial services regulation and protection for customers?

4. A key point in the Financial Services and Markets Act 2000 is authorisation. Under FSMA 2000 S19 Financial Services and Markets Act 2000 (legislation.gov.uk) this refers to the 'general prohibition' which means only authorised firms can carry out regulated activities. Only an authorised firm can make a criminal complaint. Under FSMA 2000 S23 Financial Services and Markets Act 2000 (legislation.gov.uk) contravention of S19 is stated to be a criminal offence. Do CPS officers receive training to understand that contravention of FSMA 2000 S19 General Prohibition Financial Services and Markets Act 2000 (legislation.gov.uk) is a criminal offence under S23 Financial Services and Markets Act 2000 (legislation.gov.uk)?

5. Do CPS officers receive training in commercial reality, to cover information in the public domain at the time an alleged offence was committed, consideration of civil contracts, action taken by the lender, and their FCA Disciplinary and Regulatory record in the public domain

Financial Services Register | FCA? Are the CPS obliged to disclose their findings?

6. Are CPS officers made aware through training that Final Decisions of the Financial Ombudsman are legally binding on the lender, should the customer accept the decision?

7. Are CPS officers considering mortgage fraud allegations made aware (to enable them to consider the charging threshold) of the FSA/FCA Handbook FCA Handbook - FCA Handbook and how a police officer should go about establishing whether a fraud had occurred taking into account the FCA definition of Mortgage Fraud Mortgage fraud | FCA 'when individuals defraud a lender through the mortgage process'?

8. Are CPS officials made aware (as part considering the charging threshold and complying with Charging Practice) of the NCA 'Financial Investigators Support System' to check the correct legal entity when considering a mortgage fraud allegation?

9. What are the obligations on the CPS to disclose to the defence that the mortgage product in any police allegations were (as shown on documentation) an FSA/FCA regulated product, and disclose how the broker and lender complied with their statutory regulatory obligations under the Financial Services and Markets Act 2000?

10. Can you supply any other information which might help me understand the approach of the CPS regarding alleged 'mortgage fraud' to a historic case (Fraud Act 2006 applies), and how the threshold can be met when the complainant is not a legal entity (it is a brand name)?"

5. The CPS responded on 3 February 2022, providing the following responses:

For questions 1 and 2, it explained that it does not hold the requested information and, under FOIA, it is not obligated to produce it to provide a response.

For questions 3 and 4, CPS explained that no specific training is currently offered as the CPS training is directed at the highest priority areas.

For questions 5 and 6, it advised that CPS Prosecutors do not receive training as described in points 5 and 6, and that it was not clear by what was meant in point 5 regarding the CPS' disclosure of findings.

For questions 7 and 8, CPS explained that the facts of each case are considered, and the relevant guidance is applied. CPS explained that there is no specific training or guidance on the points described.

For question 9, CPS explained that disclosure is considered on a case-by-case basis, in accordance with the Criminal Procedure and Investigations Act (CPIA) 1996.

For question 10, the CPS explained that it does not hold recorded material containing the information specific to the opinions sought.

6. Following an internal review the CPS wrote to the complainant, upholding its original response.

Scope of the case

7. The complainant contacted the Commissioner on 24 February 2022, to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of the investigation to be to determine whether the CPS is correct when it says it does not hold information in relation to the request.

Reasons for decision

9. Section 1(1) of 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.
10. In scenarios such as this, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
11. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
12. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. He will also consider, where applicable, the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In

addition, he will consider any other information or explanation offered by the public authority which is relevant to his determination.

13. The Commissioner's role is not to consider whether a public authority should hold information that has been requested but whether, on the balance of probabilities, it does or does not hold it.
14. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that the public authority holds no further relevant information.
15. In his guidance, the Commissioner recognises that FOIA only applies to information that a public authority already holds in recorded form at the time of a request.

The complainant's view

16. The complainant has explained to the Commissioner that their FOIA request concerns the training of CPS officers regarding financial services rules and regulations following the Financial Services and Markets Act (FSMA) 2000, which set up the Financial Services Authority (FSA). FSA introduced handbooks with rules.
17. The complainant has explained that all mortgage customers of financial firms have a right of action for damages under FSMA 2000 s150 Timeline, for contravention of the statutory duty of firms to comply with rules.
18. The complainant has advised that the CPS' response to their FOIA request advises that there is no training of officers regarding the FSMA 2000 legislation.
19. The complainant has provided further information relating to regulations within the Fraud Act 2006 and the FSMA.
20. The complainant explained that since they believe that CPS officials do not receive training in FSMA 2000, they cannot possibly consider an allegation of mortgage fraud unless their officials are conversant with the Financial Conduct Authority definition of mortgage fraud.
21. The complainant has explained that they believe the head of the Specialist Fraud Division is possibly covering up a serious system failing at the CPS by not answering their FOIA enquiry regarding the borderline between criminal and civil liability, as referred to in the Fraud Act 2006 information.

22. The complainant wants the CPA to resolve their complaint by accepting that since CPS officials do not receive training as advised in their FOIA request, they cannot meet the CPS Fraud Act 2006 Charging Practice requirement to establish the borderline between criminal and civil liability, which in turn means that they are not sufficiently competent to consider the charging threshold, as they do not have the necessary knowledge to establish the role of broker, lender and any unauthorised firm who has made a criminal complaint.
23. The complaint has advised that the above matter is of public interest, which affects all mortgage customers of financial firms and it is therefore essential for transparency and honesty in responses.

The CPS' response

24. The CPS has explained to the Commissioner that it has provided a response to all of the questions within the request, including providing any recorded information held.
25. The CPS has also advised that the only parts of the request that have not been answered, are those questions where the complainant has asked for an opinion/where information would need to be created.

Conclusion

26. In reaching his decision in this case, the Commissioner has taken into account the actual wording of the questions that comprise the request for information. He has also taken account of the views put forward by the complainant and the explanations provided by the CPS.
27. The Commissioner understands the complainant's arguments and why they consider such information may be held. However, as the CPS has explained, FOIA is for information that is already recorded and, as such, the CPS is not obliged to create information to answer the complainant's request.
28. The Commissioner also understands the complainant's concerns; however, it is not his role to investigate how public authorities operate. If the complainant has concerns regarding how the CPS is operating, this needs to be addressed with the relevant body and not through FOIA requests.
29. The Commissioner also notes the other requests that the complainant has referred to, however, these have no bearing on the outcome of this decision. The Commissioner can only consider the individual request and if the public authority has complied with FOIA when responding to it.

30. Based on the information provided, the Commissioner is satisfied that the CPS provided a response to the questions asked and were also not required to create responses for the remaining questions. As such, it has met the requirements of section 1(1) of FOIA.

Right of appeal

31. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. 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.
33. 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

Michael Lea
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