

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

### **Decision notice**

**Date:** 12 September 2022

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

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

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1. The complainant requested information from the Financial Conduct Authority ('the FCA') for internal documents and correspondence relating to the short selling of Gamestop stocks between December 2020 and February 2021. The FCA refused to comply with the requests citing section 12 (cost limit) of FOIA.
2. The Commissioner's decision is that the FCA was entitled to aggregate the requests under section 12(4) of FOIA and to refuse to comply with the request in accordance with section 12(1) of FOIA. The Commissioner also finds that the FCA complied with its obligations under section 16 to offer advice and assistance. He finds that the FCA breached section 10(1) FOIA by failing to respond to the request within the statutory time for compliance.
3. The Commissioner does not require the FCA to take any steps.

#### **Request and response**

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4. On 25 August 2021, the complainant made the following request for information to the FCA:

"I am looking for any internal documents and correspondence concerning the short squeeze of Gamestop shares that happened during the period of Dec 2020- Feb 2021 and was encouraged by groups on Reddit. I would be interested in what reports were

produced and the discussion that took place up to and after the event.”

5. On 27 August 2021, the complainant made an additional request for information to the FCA as follows:

“I am looking for internal correspondence and documents concerning the short selling of Gamestop and AMC stocks by UK customers on either the Robinhood or UK brokerage during the period of January to February 2021. A public statement was issued by the FCA that can be found here:

[https://www.fca.org.uk/news/statements/recent-share-trading-issues.](https://www.fca.org.uk/news/statements/recent-share-trading-issues)”

6. The FCA responded on 29 April 2022, stating that it had aggregated the two requests. It said that the cost of complying with the requests would exceed the cost threshold of £450 applicable to the public authority. In accordance with this finding, the FCA issued a section 12 refusal notice in reply to the complainant’s request for information. The FCA explained that, due to the nature of the request, if a refined request was brought within the cost limit, it would be likely that other exemptions would apply under FOIA.
7. The FCA upheld its initial application of section 12 of FOIA via internal review on 27 June 2022 having clarified that it held “a large volume of information relating to ‘short squeeze’ of Gamestop and AMC shares which may be of relevance”.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 12 July 2022 to complain about the way their request for information had been handled. The complainant disagrees with the FCA’s application of section 12 of FOIA.
9. The Commissioner considers the scope of his investigation to be as follows: to determine whether the FCA was entitled to aggregate the requests in line with section 12(4) and refuse to comply with the requests under 12(1). The Commissioner has also considered whether the FCA met its obligation to offer advice and assistance, under section 16 of FOIA.

## Reasons for decision

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### Section 12(4) – Aggregation of related requests

10. When a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”) can be satisfied.

11. Section 12(4) of FOIA states:

“The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

12. Regulation 5 of the Fees Regulations states:

“(1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority –

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concern or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which –

(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and

(b) those requests are received by the public authority within any period of sixty consecutive working days.

### **Was the FCA entitled to aggregate the requests?**

13. Regulation 5 of the Fees Regulations outlines the three part test which must be met in order for requests to be aggregated. Firstly, the request must be made by one person, or by different persons acting in concert. Secondly, the requests must relate to the same, or similar information, 'to any extent'. Finally, the requests must be received by the authority within any period of sixty consecutive working days.
14. The Commissioner has reviewed the complainant's two requests aggregated by the FCA. These requests were submitted on 25 and 27 August 2021. He is satisfied that both requests were made by the same complainant and within a period of 60 working days.
15. The Commissioner accepts that the phrase 'to any extent' represents a fairly wide test. However, the Commissioner's guidance also notes 'requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests, or where there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested.'<sup>1</sup>
16. Having reviewed the wording of the complainant's requests, the Commissioner is satisfied that there is an overarching theme in that they both request internal documents and correspondence concerning the short selling of Gamestop stocks over a similar period of time in the Winter of 2021/2022.
17. The Commissioner, therefore, finds that the FCA was entitled to rely on section 12(4) of FOIA to aggregate the two requests of 25 and 27 August 2021 when determining whether the appropriate cost limit, as set out below, is likely to be exceeded.

### **Section 12 – cost of compliance**

18. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

<sup>1</sup> [costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf \(ico.org.uk\)](#)

19. Section 12(2) of the FOIA states that subsection (1) does not exempt the public authority from the obligation to comply with paragraph (a) of section 1(1) (the duty to inform an applicant whether it holds information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit. The FCA relied on section 12(1) in this case.
20. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the FCA is £450.
21. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for the FCA.
22. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
  - determining whether the information is held;
  - locating the information, or a document containing it;
  - retrieving the information, or a document containing it; and
  - extracting the information from a document containing it.
23. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
24. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
25. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the

requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

### **Would the cost of compliance exceed the appropriate limit?**

26. The FCA stated that it holds "a large volume of information relating to 'short squeeze' of Gamestop and AMC shares which may be of relevance" to the above requests. The FCA provided an example of an FCA employee who conducted a search for information relevant to the request using the keyword "Gamestop", which found 685 potentially relevant emails in their own email account alone. The FCA estimated that it would take five minutes to review, determine the relevancy and manually extract the relevant information from each email. This would take a single FCA employee approximately 57 hours to complete. The FCA added that this exercise would need to be carried out "by multiple FCA employees across various departments" in order to satisfy the requests for information. Based on the detailed information provided in the internal review, the Commissioner was satisfied that a decision could be reached without seeking further submissions from the FCA.
27. The Commissioner does not consider the FCA's estimate of 57 hours at 5 minutes to "review, determine the relevancy and extract the relevant information from each email" to be unreasonable. If the same FCA employee was to take half that time to locate and review each record for information within the scope of the request, the time taken would still be in excess of the appropriate limit. The Commissioner notes the FCA's assertion that this exercise would need to be carried out by multiple FCA employees. Taking that into account and using a conservative time estimate, would take the costs of complying with the request above the appropriate limit because it would require a manual review of a large number of electronic records by a number of members of staff.
28. Based on the available information, the Commissioner considers that the FCA estimated reasonably that it would take more than the 18 hours / £450 limit to respond to the requests. The FCA was therefore correct to apply section 12(1) of FOIA to the complainant's requests.

### **Section 16(1) – The duty to provide advice and assistance**

28. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice<sup>2</sup> in providing advice and assistance, it will have complied with section 16(1).

<sup>2</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

29. The Commissioner notes that the FCA advised that it could not offer a meaningful suggestion that would bring the request within cost while still providing the complainant with significant information not already in the public domain.
30. The Commissioner accepts that due to the nature of the requests, and due to the length of time it would take to search and manually analyse each record and retrieve the information, the requests could not be meaningfully refined to allow the information to be provided within the cost limit. As such, the Commissioner is satisfied that there was no breach of section 16(1) of the FOIA. The Commissioner also notes the FCA's comments that the situation was complicated by the fact that section 348 of the Financial Services and Markets Act 2000 may also apply to information within the scope of the request, along with other exemptions.

### **Section 10 – Time for response**

31. Section 10(1) FOIA states that a public authority must respond to a request promptly and in any event not later than the twentieth working day following the date of receipt.
32. The requests for information were made on 25 August 2021 and 27 August 2021. The FCA responded with a refusal notice on 29 April 2022. As this was significantly more than 20 working days after the requests were made, the Commissioner finds that the FCA breached section 10(1) of FOIA.

## Right of appeal

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33. 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)

34. 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.
35. 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 .....**

**Claire Churchill**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**