

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 May 2023

Public Authority: Bank of England

Address: Threadneedle Street
London
EC2R 8AH

Decision (including any steps ordered)

1. The complainant has requested information about settlement fails related to particular US entities. The Bank of England ("the Bank") refused to confirm or deny whether it holds the requested information, citing section 44(2) (prohibitions on disclosure) of FOIA as its basis for doing so.
2. The Commissioner's decision is that the Bank was entitled to rely on section 44(2) of FOIA.
3. The Commissioner does not require the Bank to take any further steps.

Request and response

4. On 20 January 2023, the complainant wrote to the Bank and requested information in the following terms, relating to three specific securities:

"Could I please request a copy/access to data provided to you by any Clearing and Depository Service, Clearing Counterparty (CCP), Broker-dealer, or other legal entity as it pertains to uncleared/outstanding failed trade deliveries (also known as "settlement fails" and "fails to deliver (FTDs)") of the US securities listed below that were bought by,

or on behalf of British subjects, Foreign nationals, legal entities using British based or foreign based brokers or legal entities, on the specific dates listed in the table below.

I am requesting a summary of anonymous and aggregated data of outstanding settlement fails as of the dates below, nothing else. I do not wish to be notified of the companies identities holding/reporting the settlement fails.”

5. The Bank responded on 15 February 2023. It refused to confirm or deny that it held the requested information, citing section 44(2) of FOIA.
6. Following an internal review the Bank wrote to the complainant on 15 March 2023. It maintained its reliance on section 44(2) of FOIA.

Reasons for decision

Background

7. For context, the Bank explained that the information being sought by the complainant in this case is granular data in relation to 'settlement fails' in certain specified securities. A security is a tradable financial instrument, such as a share or bond, which is issued by a company (known as an 'issuer'). In this case the complainant identified the specific information which they are interested in by using an alphanumeric code called an 'ISIN'. ISINs uniquely identify a specific security issued by a specific issuer.
8. The Bank further explained that settlement fails occur during securities trading when, on the contracted settlement date, either the seller of the securities does not deliver the securities in due time or the buyer does not deliver funds in the appropriate form. Sitting in between the sellers and buyers are central securities depositories (CSDs), which operate the UK's securities settlement system, which allows for ownership of securities to be transferred in electronic form. When a successful trade occurs, the securities settlement system organises the transfer of those securities to the buyer, as well as the transfer of funds to the seller.
9. The Bank explained that amongst its wide-ranging functions, it supervises certain financial market infrastructures (FMIs), which include CSDs, interbank payment systems, and central counterparties. In response to a previous FOIA request, the Bank confirmed to the complainant that it held certain daily reports relating to 'trades' in securities, and those reports were provided to it by the FMIs which it regulates. The reports, which contain the type of granular settlement fail data which the complainant is seeking, were received by the Bank for

the purposes of its supervisory functions relating to recognised CSDs and its functions under the CSD regulation.

Section 44 – Prohibitions on disclosure

10. Section 44 of FOIA states:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any retained EU obligation, or
- (c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within paragraphs (a) to (c) of subsection (1).”

11. The Bank considers that section 44(2) of FOIA is engaged in this case, as the confirmation or denial that would have to be given in order to comply with section 1(1)(a), would itself fall within the exemption at section 44(1)(a). That is because, if held, the requested information would be prohibited from disclosure by virtue of section 348 (restrictions on disclosure of confidential information by FCA, PRA, etc.) of the Financial Services and Markets Act 2000 (FSMA).

12. Section 348 of FSMA states:

“(1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of-

- (a) the person from whom the primary recipient obtained the information; and
- (b) if different the person to whom it relates.

(2) In this Part “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).

- (3) It is immaterial for the purposes of subsection (2) whether or not the information was received-
- (a) by virtue of a requirement to provide it imposed by or under this Act;
 - (b) for other purposes as well as purposes mentioned in that subsection.
- (4) 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."
13. The Bank advised that, in this case, section 348 must be read alongside the additional provisions in paragraph 23(1) of Schedule 17(A), which states:
- "Sections 348 to 350 and 353 (disclosure of information) apply in relation to information received by the Bank for the purposes of, or in the discharge of, any of its functions relating to recognised clearing houses or recognised CSDs or any of its functions under the EMIR regulation, the CSD regulation, any EU regulation originally made under the CSD regulation which is retained direct EU legislation, or any subordinate legislation made under the CSD regulation on or after IP completion day."
14. With regard to section 348(1) of FSMA, the Bank confirmed that it is the primary recipient of the reports which would contain the requested information, if any settlement fails for the identified securities were in fact reported on the dates set out in the request. The Bank further confirmed that it does not have consent to disclose the contents of those reports from either the CSDs from which it obtains the reports, nor any of the persons or entities whom information contained in the reports may relate to.
15. The Bank explained that securities in companies such as those entities named within the request are listed and publicly traded, so a degree of information about offers and bids in relation to such securities is publicly available. However, details of settlements fails are not publicly available. Therefore, if the Bank were to confirm or deny that it holds the requested information, it would be confirming or denying that settlement fails on specific, named, securities took place on one or more of the specified dates. That would in itself place confidential information

about the business affairs of the entities issuing the securities into the public domain.

16. The Commissioner notes the complainant's arguments that they only requested an aggregated summary of settlement fail data, and such information would (in their view) not identify any particular person or entity. However, the Commissioner notes that the request does not seek all settlement fails reported on a specific date, it seeks settlement fails relating to three identified securities. Therefore any confirmation or denial the Bank issued would be inextricably linked to those specific securities – and, hence, the business affairs of the issuer.
17. The Commissioner is satisfied that in all circumstances of the case the Bank has demonstrated that confirming or denying that it held information within the scope of the request would itself reveal information that would be prohibited from disclosure by virtue of section 348 of FSMA. Therefore, by extension, the Bank was entitled to rely on section 44(2) of FOIA to neither confirm nor deny that it holds the requested information.

Right of appeal

18. 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

19. 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.
20. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF