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Mr Joel Benjamin
Whatdotheyknow.com

(By email)

14 March 2019

Our Ref: FOI6023

Dear Mr Benjamin

Freedom of Information : internal review

We refer to your email of 31 December 2018 asking the Financial Conduct Authority ("FCA") to review its decision of 19 October 2018 in response to the information you requested under the Freedom of Information Act 2000 ("the Act"). This was for:

"I am interested in information, (meeting minutes, emails and case notes) in relation to the FCA's decision not to pursue investigations into the alleged manipulation of the ISDAfix interest rate swaps benchmark run, out of New Jersey USA by UK domiciled & regulated broker ICAP (now NEX).

Please provide relevant information in relation to the FCA's decision not to pursue or continue inquiries and regulatory enforcement action into potential manipulation of both USD and GBP ISDAfix between 2011 and 2018 with:

- US CFTC
- UK PRA
- HM Treasury and the Chancellor of the Exchequer
- Bank of England
- Office of the Prime Minister 10 Downing Street
- UK Serious Fraud Office
- US Federal Reserve
- US DOJ"

As you may be aware, we would normally aim to complete a review within 20 working days. In this case the review has taken longer, for which I apologise.

The FCA made an initial decision that it was unable to comply with your request because we estimate that to do so would exceed the appropriate limit set by the Regulations made under section 12 of the Act (The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") made by the Ministry of Justice). The Regulations provide that, for the FCA, the appropriate limit is £450, i.e. 18 hours at the rate of £25 per person per hour.

Where we estimate that to comply with a request would exceed the appropriate limit, then we should consider providing an indication of what, if any, information could be provided within the appropriate limit. In such circumstances, the Information Commissioner expects a public authority to inform the individual that the request is likely to be over the cost limit and provide advice and assistance under section 16 of the Act as to how it may be refined (if possible) to bring it within the appropriate limit.

In this case, we suggested that we may be able to consider within the cost limit a request for the recorded information relating to the decision taken by the FCA to close the review.

Internal review

On 31 December 2018 you requested an internal review of this decision and submitted a narrowed request for the following:

"I am writing to request an internal review of The Financial Conduct Authority's handling of my FOI request 'FCA decision not to investigate/ take enforcement in relation to ISDAfix manipulation by ICAP'.

Firstly with regard to assessing the FOI request, The FCA has neither confirmed nor denied that information/ correspondence with the named regulatory bodies is held in each case, please do so.

Additionally, the FCA claim that to examine (primarily digital) records regarding information (correspondence) with the following 8 bodies would exceed £450, or 2 hours+ search time per agency.

- US CFTC
- UK PRA
- HM Treasury and the Chancellor of the Exchequer
- Bank of England
- Office of the Prime Minister 10 Downing Street
- UK Serious Fraud Office
- US Federal Reserve
- US DOJ

This is questionable, as digital searches within key word parameters are fast, and can generate databases of document titles that can be filtered by the requester to narrow down items of interest to save time and money.

In the interests of saving staff time, I am prepared to drop the US DOJ, and UK PRA from the search fields, leaving just 6 agencies of interest, therefore proving 3 hours search time per agency.

I am also happy to narrow the search period to between June 2012 to 30 September 2018."

On 31 January 2019 you confirmed that "... the request relates to the information base and circumstances whereby the FCA chose to discontinue regulatory investigations and/or enforcement action vs ICAP only ... and the rationale/justification for the FCA's decision."

I have now had an opportunity to review the FCA's decision not to comply with your request.

The outcome of my review is that I consider that we have correctly applied the provisions of section 12 of the Act. In reaching this decision, I have reviewed our response of 19 October 2018 and also the points you make in your subsequent email of 31 December 2018. In particular, you say that carrying out digital searches within key word parameters are fast and is not a task that should exceed £450.

Our records are not held in a format that would allow us to easily identify and extract the information you have requested. As confirmation of this, we have again reached out to the department within the FCA most likely to hold the information falling within the scope of your request, and they have confirmed that complying with your (albeit narrowed) request would still exceed the cost limit. This is because the time period in question is still too broad and we estimate that we would need to review in excess of 3,000 documents to determine which of these (if any) are relevant to your request. Therefore, to determine what information is responsive to your request among this material would exceed the appropriate cost limit provided by the Act. I say a little more about this below.

Section 12 of the Act

I do not wish to lengthen this reply by repeating all the relevant provisions of this section of the Act, which we explained in our original response dated 19 October 2018. However, I thought it may be helpful to reiterate the principles we apply when we rely on section 12 of the Act (i.e. where the cost of compliance is estimated to exceed the cost limit, known as the appropriate limit).

The Information Commissioner's Office's guidance states that if a public authority starts to carry out its searches without an initial estimate, it can stop searching as soon as it realises it would exceed the appropriate limit. We are not obliged to search up to the appropriate limit. As a matter of good practice, we are expected to avoid providing the information found as a result of our searches and claiming section 12 for the remainder. The Commissioner's position is also that we are not at liberty to refine the request ourselves by choosing to deal with only the parts that we can consider within the appropriate limit.

Where we estimate that to comply with a request would exceed the appropriate limit then we are expected to consider giving an indication of what, if any, information could be taken into

account within the cost ceiling by advising how the request might be reformed or re-focussed. However, this requirement is expressly qualified "*only in so far as it would be reasonable to expect the authority to do so*". In the case of your own request for information (as set out above), we are not able to offer any further suggestions.

I am therefore of the view that we are not able to determine whether there is information that we might be able to consider that would not exceed the appropriate limit set by the Regulations made under section 12 of the Act.

As you may be aware, Martin Wheatley (former CEO of the FCA) confirmed to the Treasury Select Committee that the FCA did conduct a preliminary review into alleged ISDAfix manipulation in 2014. This review was closed without further action being taken and no Enforcement investigation was carried out.

Conclusion

I realise that you may be disappointed not to receive the information you requested but hope that this letter explains my decision clearly on why we are not able to comply with your request.

If you are not content with the outcome of the internal review, you have a right of appeal to the Information Commissioner at Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF. Telephone: 01625 545 700. Website: www.ico.org.uk.

Yours sincerely



PP Edward Pegg
Internal Reviewer
Financial Conduct Authority