

Consumer Helpline: 0207 066 1000
Email: FreedomofInformationAppeals@fca.org.uk

12 Endeavour Square
London
E20 1JN

Tel: +44 (0)20 7066 1000
Fax: +44 (0)20 7066 1099
www.fca.org.uk

Mr Steven Franks
(Via email)

3 September 2019

Our Ref: FOI6519

Dear Mr Franks

Freedom of Information: internal review

I refer to your e-mail dated 15 July 2019 asking the Financial Conduct Authority ("FCA") to review its decision of the 4 July 2019 in response to the information you requested under the Freedom of Information Act 2000 ("the Act"). This was for the following (please note we have renumbered your request for ease of responding):

"Following the HR led investigation into the conduct of [named member of staff], and his sudden resignation, please confirm the following -

- 1. The total cost of the investigation and the length of time it took*
- 2. The period covered by the investigation*
- 3. How many complaints from staff were considered by the investigation and how many had been received by HR*
- 4. I would also like to be informed of the number of investigations commenced in the last 5 years in respect of [specified job grade] at the FCA and how many of these led to either dismissal or resignation of the subject"*

Preliminary

In our original response dated 4 July 2019 we informed you that we could neither confirm nor deny that we hold the information you are seeking for points 1-3 of your request. We also stated that we hold the information you are seeking for point 4 of your request but were unable to disclose it to

you. I will not repeat the arguments here but simply confirm that we informed you that the following exemption under the Act applies:

- Section 40(1) - information that constitutes the personal data of individuals other than you, which it would be unfair to disclose.

Internal review

Turning to your request for us to reconsider our decision regarding supplying you with the information you are seeking, or confirming or denying whether this is held, 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.

I have now had an opportunity to review our original response. The conclusion of my internal review is that I consider that we have correctly applied the provisions of section 40 of the Act. I have said a little more about why I have reached this decision in the annex to this letter.

Conclusion

I realise that you may be disappointed with our response but I hope that this letter explains my decision clearly on why we are not able to comply with your request. For the reasons set out in our original response dated 4 July 2019, along with the information provided in this letter, I therefore retain the view that we have correctly applied the exemption of the Act we have cited.

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

Yours sincerely



Rebecca Major
Internal Reviewer

FOI6519: Exemption to confirming or denying whether information is held in response to points 1-3 and withholding information in response to point 4 of the request for information, dated 6 June 2019, made to the Financial Conduct Authority ("FCA") under the Freedom of Information Act 2000 ("the Act") by Mr Steven Franks

This annex provides more detail on the exemption in section 40 (Personal information) of the Act applied to the information requested from the FCA in points 1-4 of the request with the reference FOI6519.

Neither confirm nor deny

In considering our use of "neither confirm nor deny" we have taken account of the ICO Guidance: *When to refuse to confirm or deny information*

https://ico.org.uk/media/for-organisations/documents/1166/when_to_refuse_to_confirm_or_deny_section_1_foia.pdf

This states that when applying a neither confirm nor deny provision under any exemption, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under section 1(1)(a) of the Freedom of Information Act 2000 ("the Act"). The authority should consider both whether any harm would arise from confirming that information is held and whether harm would arise from stating that no information is held. Otherwise, if the same (or same type of) request were made on several occasions over time, the changing response could reveal whether information was or was not held.

The ICO uses the example of the (former) FSA receiving a request for "any information on complaints about inadequate cash reserves within Bank X last year". The exemption cited in this case is section 43 (Commercial interests) on the basis that to confirm that complaints had been made against Bank X would prejudice Bank X's commercial interests, even though denying it received any such complaints would have no effect. It does not matter whether or not the FSA actually holds the information.

The same principle applies to your own request and our use of section 40. Consequently, the FCA is prohibited from confirming or denying whether we hold the information requested.

Section 40 (Personal information)

Section 40(5)(b) of the Act provides that the duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of section 40(1) if the confirmation or denial that would have to be given to meet the FCA's duty under the Act would itself contravene any of the principles in the Data Protection Act 2018 ("DPA").

We have applied this exemption because the confirmation or denial that would have to be given to satisfy points 1-3 of your request would itself entail the disclosure of the personal data of an individual other than yourself, which would breach the requirement of the General Data Protection

Regulations ("GDPR") including the data protection principles of Article 5 and the Data Protection Act 2018 ("DPA").

In particular, it would be a breach of the first data protection Principle as set out in Article 5 of the GDPR to confirm whether or not we hold the information you have requested, as it would not be necessary or fair to the individual concerned, or lawful, where none of the conditions in Article 6(1) of the GDPR have been met.

The individual named in your request has a reasonable expectation that any personal information held by the FCA would not be disclosed in such circumstances to the public at large (assuming the information requested was held, which as I have said, I am neither confirming nor denying) and should therefore be protected.

If we were to confirm that information of relevance to your request is held then this could be interpreted in a negative way. The prejudice to the named individual would not be trivial or insignificant, as the way your request is framed could be interpreted as meaning that the individual was a person of interest in an FCA internal investigation and therefore involved in misconduct on a personal basis. That would reflect negatively on the individual's reputation. Therefore, disclosure of the requested information (if it was held, which I am neither confirming nor denying) would be likely to lead to the harmful consequences that the exemption from disclosure in section 40 of the Act is there to prevent.

On balance, I therefore consider that it would be unfair for a public body such as the FCA, which operates under a strict confidentiality regime, to confirm or deny whether the information requested is held in circumstances not envisaged by that regime.

In relation to point 4 of your request section 40(2) of the Act provides that "Any information to which a request for information relates is also exempt information if ... (a) it constitutes personal data which do not fall within subsection (1), and (b) either the first or the second condition below is satisfied".

We regret to inform you we are unable to provide the number you have requested. This is because where the population of individuals is less than ten, there is a risk this may lead to the identification of the individuals concerned and their personal data being disclosed

In particular, staff have a reasonable expectation that the personal information relating to their employment should be protected. To breach this expectation is not 'fair' (as noted in the first principle of Article 5 of the GDPR), or 'necessary' or 'lawful' (where none of the conditions in Article 6(1) of the GDPR have been met). I also consider that there is very little or no legitimate public interest to be pursued in providing details of the numbers of staff at a specified job grade level that have been investigated and the outcomes.

I consider that this exemption applies because the first condition (as stated in section 40(3) of the Act) is satisfied as the information requested, "*the number of investigations commenced in the last 5 years in respect of [specified job grade] at the FCA and how many of these led to either dismissal or resignation of the subject*" comprises the personal data of individuals other than you. As mentioned above it would be a breach of Principle 1 of the requirement of the General Data

Protection Regulations ("GDPR") including the data protection principles of Article 5 and the Data Protection Act 2018 ("DPA") to disclose such information to the public at large, as it would not be lawful or fair to the individuals concerned.

I am also of the view that the release of any such information may be detrimental to individuals at the specified job grade level and that considerable personal distress would be likely to be caused if this led to comment and/or speculation as to the identities of individuals and the reasons for any internal investigations being undertaken. Incorrect assumptions may also be made about any individuals who have left the FCA employment on a sudden basis which may be for reasons unconnected to the subject matter of your request.

Section 40 is an "absolute" exemption, and so it is not necessary to consider the public interest for and against disclosure of the information falling within this exemption. I therefore remain satisfied that section 40 has been applied correctly to points 1-4 of your request.