Freedom of Information: internal review

I refer to your e-mail dated 3 January 2017 asking the Financial Conduct Authority ("FCA") to review its decision of the 23 December 2016 in response to the information you requested under the Freedom of Information Act 2000 ("the Act"). This is:

"I would like to request details about the current file review methodology used by the Retail Investments Department when assessing investment advice files for suitability and disclosure. In particular:

1. The investment advice assessment tool and accompanying guidance

2. The file review training material including PowerPoint presentation (including speaking notes), case study material and model answer."

In our original response we informed you that we hold the information you are seeking but that this was exempt from disclosure under section 31 (Law enforcement) of the Act.

You subsequently confirmed on 16 January 2017 that we should interpret your internal review request as being limited to the second part of your original request only. My review has therefore only considered the application of section 31 in respect of the training material which is held.
Internal review

I now turn to your request for us to reconsider our decision regarding supplying you with the information you are seeking (as redefined above). As you may be aware, we would normally aim to complete a review within 20 working days. In this case the review has taken considerably longer, for which I apologise.

As a result of your challenge of our original decision, I have reviewed our response of the 23 December 2016 and the extensive points you make in your subsequent e-mail of the 3 January 2017. Having taken into account all the relevant factors in this case, and the arguments you make in your internal review request, the outcome of my review is that I consider that some information previously withheld can now be disclosed – please find the relevant information enclosed with this letter.

However, with regard to the remaining information, I consider we have correctly applied the provisions of section 31 of the Act, so the original decision stands. In addition, on further consideration, I am of the opinion that the exemptions in section 40(2)(b) (Personal Information), section 43 (Commercial interests) and section 44 (Prohibitions on disclosure) of the Act are also engaged. In terms of the application of the qualified exemptions in sections 31 and 43 of the Act, I am satisfied that the public interest in favour of disclosure is outweighed by the public interest in maintaining the (relevant) exemption. This letter explains how I reached that view.

I should also add that, in most cases, public authorities (such as the FCA) are required to consider requests for information made under the Act without reference to the identity or motives of the requester. We should view disclosure as a release of information to the public generally. This means that we must consider the consequences of disclosure to the world at large, and not just in terms of providing the material to the particular requester. Our responses have been provided on this basis.

Other matters

If I may, I should also like to explain that if you wish to publish the information provided to you in response to this request, or to make any other commercial use of it, you will be required to apply for a licence from the FCA and also be required to acknowledge the FCA’s copyright. This may be subject to such conditions as the FCA considers appropriate in the circumstances. Our policy on re-use may be found here: https://www.fca.org.uk/freedom-information/fca-publication-scheme/re-use-public-sector-information-regulations.

In addition, information that we have released under the Act, and which we think is of wider public interest, may be published on our Freedom of Information Disclosure Log. The aim of this is to keep in one place all the information disclosed under the Act, which we think is of wider public interest. Further information may be found at: https://www.fca.org.uk/freedom-information/disclosure-log.

Conclusion

I realise that you may be disappointed not to receive all the information you requested but I hope that this letter explains my decision clearly.
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

Internal Reviewer
Financial Conduct Authority (“FCA”)

Freedom of Information Request – FOI4816

This annex provides more detail on the qualified exemptions of the Act in section 31 (Law enforcement) and section 43 (Commercial interests); and the absolute exemptions in section 40 (Personal information) and section 44 (Prohibitions on disclosure) applied to the information requested from the FCA with the reference FOI4816.

As explained in the main body of this letter, I am of the view that we are not able to provide you with all the information you have requested because these exemptions are engaged for the reasons stated below.

Section 31 (Law enforcement)

The qualified exemption in section 31(1)(g) and 31(2)(c) of the Act is engaged as disclosure of all the information you have requested would, or would be likely to, prejudice the exercise by the FCA of its functions for the purposes of ascertaining whether circumstances exist or may arise which would justify regulatory action in pursuance of any enactment.

The harm to our function of “ascertaining” or monitoring compliance with our regulatory requirements would be likely to occur over time. We consider that disclosure of the withheld information would be likely to lead to firms trying to limit the FCA’s flexibility or to firms changing their conduct by anticipating how the FCA will respond, based on the more detailed information in the training guidance. Full disclosure would also be likely to lead to satellite disputes with firms or individuals over why one regulatory approach had been used rather than another, thereby restricting the FCA’s exercise of its judgement, causing delay and diverting resources. This would prejudice the effectiveness of the FCA’s regulatory functions in order to meet its operational objectives, in particular the FCA’s consumer protection and market integrity objectives.

The information we hold has been prepared for internal use in order to provide training to FCA supervisors to enable them to employ a consistent and coherent but flexible approach to assessing the suitability of, and disclosure in the course of giving investment advice provided by those working in the financial services sector. The materials also provide advice to supervisors on what the FCA should be looking for when firms have provided information to the FCA for client case studies and file reviews.

The flexibility in the guidance is consistent with the wish of the FCA (and of stakeholders including Parliament) that its regulatory approach should be more judgment-based compared to that of its predecessor. We do not wish supervisors to adopt a ‘tick box’ approach or lose sight of the bigger picture and just follow the training information; they are encouraged to exercise judgement.

Similarly, we consider it is undesirable that firms or individuals believe that they are able to predict when and in what circumstances the information they provide the FCA will or will not be subject to follow-up action by the FCA. Rather, leaving a certain amount of flexibility and
judgment in the regime encourages firms and individuals to focus on carrying on their regulated activities in compliance with the full range of requirements which apply to them, rather than simply focusing on following the guidance in the training materials, regardless of the circumstances of the particular client they are advising. This approach is more likely to promote higher levels of compliance by firms and individuals and thereby be in the public interest.

In addition, the information contained in the training materials (in particular the case studies and examples) were not developed as perfect templates or model answers, but contain examples of non-compliant advice or disclosure which are not clearly signalled, as the materials were produced solely for internal use by, and for the training of, FCA staff. Disclosure could therefore be misleading, as firms may misinterpret the compliance status of the materials. It would be damaging to the wider public if firms and individuals took the training materials to be best practice or a model approach and treated them as formal non-handbook guidance when this is not the case.

As section 31 is a qualified exemption, I have gone on to consider the public interest in maintaining the exemption against the public interest in disclosure. This was set out in detail in our response letter dated 23 December 2016, which I have not repeated again here. In addition, I consider that the following factors are also of relevance:

For disclosure

- There is a public interest in favour of accountability and transparency and in the public being reassured about the training provided to FCA staff in relation to their supervision of the markets and/or firms operating in the financial services industry. This is particularly so where these matters affect consumers directly (such as the suitability of and disclosure in the course of investment advice provided by those working in financial services). This will not only improve the FCA’s accountability but facilitate informed comment on the FCA’s regulatory and supervisory approach.

- Disclosure would also enable regulated firms, their senior management and legal advisers, and the public more generally, to better understand why, where and how we make decisions on regulatory matters and on the FCA’s use of its statutory powers. In turn, this should lead to better quality decisions on and greater consistency in our supervision of firms. This could be expected to lead to an increase in stakeholders’ sense of engagement in the regulatory regime.

Against disclosure

- There is a strong public interest in the FCA being able to carry out its functions in the most effective and efficient manner possible.

- More particularly, given the FCA’s roles under the FSMA regime, there is a strong public interest in the FCA being able to ensure its supervision staff are trained effectively and not inhibiting or damaging the free-flow of information within the FCA. It is critical that FCA staff are fully trained on a consistent and coherent basis to enable them to identify where firms are not providing suitable advice and/or disclosure in line with our requirements. This in turn will enable us to focus our supervisory efforts on any such issues in line with our priorities and statutory requirements.
• Public disclosure of the full training materials provided to FCA staff carries significant risks of reverting to an inflexible or “tick-box” approach to regulation, now widely regarded as having been an unfortunate feature of the previous regulatory regime. Full disclosure would also be likely to lead to satellite disputes with firms over why one form of regulatory action had been taken instead of another (or whether we have followed our internal guidance and, if not, why not).

• As part of our regulatory approach we assess a firm’s compliance with our requirements by reviewing any client information supplied to us. If this information, or examples of it used in our training material, were to be disclosed (even in an anonymised form), firms could manipulate any such information to include this in the information sought by the FCA to obtain a favourable outcome and prevent us from identifying where weak practices may exist.

• Disclosure could also be misleading and damaging to the wider public if firms and individuals took the training case study material to be best practice or a model approach and adopted these as formal non-handbook guidance when this was not the case.

• Finally, the information in the training materials is current and could not be described as being of historic interest only.

To conclude, I consider that in this particular case the public interest in favour of disclosure is outweighed by the public interest in maintaining the section 31 exemption.

**Section 40 (Personal information)**

Section 40 (2)(b) of the Act provides that “Any information to which a request for information relates is also exempt information if … it constitutes personal data which do not fall within subsection (1)”.

I consider that this exemption applies because the first condition (as stated in section 40(3) of the Act) is satisfied as a small amount of the information requested comprises the personal data of individuals other than you. It would be a breach of Principle 1 of the Data Protection Act 1998 (“DPA”) to disclose such information to the public at large, as it would not be lawful or fair to the individuals concerned.

The information that has been redacted consists of the names of current or former FCA staff below management level and their direct FCA telephone numbers.

The relevant staff of the FCA have a reasonable expectation that the personal information relating to their current or former employment should be protected. To breach this expectation is neither ‘fair’ (as noted in the first principle), nor ‘necessary’ (as in the Condition in paragraph 6 in schedule 2 to the DPA). The individuals concerned have not given their consent for their personal details to be made available to the public at large and did not have any expectation that it would be disclosed.

In reaching this decision, I have taken into account that you may have knowledge of a certain
amount of the personal information we hold. However, I am not aware that this is available to the public generally. I therefore remain satisfied that section 40 has been applied correctly.

Section 40 is an “absolute” exemption, and so it is not necessary to consider the public interests for and against disclosure of the information falling within this exemption.

**Section 43 (Commercial interests)**

In addition, I am of the view that section 43(2) applies to some of the withheld information as disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

In keeping with the general principle that disclosure is to the world at large, when the FCA is considering whether an exemption might apply, we are required to focus on the consequences of disclosing the information to the wider public. This means that the key question the FCA must consider is whether there is a real and significant chance that disclosure to the wider public would be against the interests protected by the qualified exemption, and the balance of the public interests supports the exemption.

Some of the withheld information relates to material obtained from the FCA from a regulated company during the course of the FCA’s supervision of the firm. This material comprises forms which the firm has prepared when advice is to be provided to clients. The firm will have taken time and used resources to make sure that the forms complied with all relevant regulatory requirements. The forms could therefore be regarded as the firm’s proprietary information. The firm will have a reasonable expectation that such information would be kept confidential by the FCA.

As there is no routine public disclosure of the information provided by firms to the FCA, an ad hoc public disclosure under the Act of the information requested, where this is not already in the public domain, would be likely to place the firm at a disadvantage unnecessarily, as against those parties whose commercial interests have not been so disclosed and who have not taken the time or used the resources as the firm here has.

This exemption is qualified and I have balanced the public interests for and against disclosure as required by the Act. The factors I have considered are similar to those set out above in relation to the exemption in section 31 of the Act.

In addition, against disclosure, it is clearly in the public interest that the FCA has the ability to have open and candid exchanges with the entities, bodies and sectors it regulates and works closely with, regardless of the information’s commercial sensitivity. This will provide accompanying benefits to the entities and bodies concerned, and to other stakeholders and consumers alike. The likely result of the FCA being unable to obtain the cooperation of those entities, bodies and sectors it regulates and works closely with, to enable it to gather, share and discuss on a voluntary basis commercially sensitive information of mutual interest, would harm the FCA’s effectiveness in carrying out its statutory functions. This has been recognised by the Information Commissioner.
On balance, in this particular case, for the reasons described above, I consider that the public interest in maintaining the section 43 exemption outweighs the public interest in disclosure of the withheld information.

Section 44 (Prohibitions on disclosure)

Section 44(1)(a) of the Act provides that information is exempt from disclosure if its disclosure (otherwise than under the Act) is prohibited by or under any enactment.

Section 348 of FSMA restricts a “primary recipient” from disclosing "confidential information" it has received in carrying out its regulatory functions under FSMA, except in certain limited circumstances (none of which applies here). Under section 348(5)(a) FSMA, the FCA is identified as a primary recipient for the purposes of Part XXIII FSMA and therefore section 348(1).

Section 348 of FSMA, which triggers the exemption in section 44 of the Act, is a self-contained regime and does not depend for its operation on more general legal or lay concepts of confidentiality. If the tests in section 348 are met, the restriction on disclosure applies.

In this case, some of the information includes that received by the FCA from a regulated company in the course of our supervision of that firm. As noted above in our use of section 43 of the Act, they would have had no expectation that the “confidential information” provided would be made available to the public at large. I am satisfied that the criterion in section 348(2) FSMA is thereby met and the information requested would fall within section 44(1)(a) of the Act.

I am also satisfied that section 348 FSMA applies to information in the form of the FCA's internally-created information, where the “created” information incorporates information received by the FCA from an external party. In other words, disclosure of the “created” information would disclose the content or nature of the confidential information which has been received by the FCA, given the "inextricable link" between these types of information.

If I may, I should also like to comment on section 348(4) FSMA which states that information is not confidential if (a) it has already been made legitimately available to the public; or (b) it can be summarised or so framed that it is not possible to ascertain from it information relating to any particular person. I consider that sub-section (4) is not a relevant consideration in this case, other than in relation to any information that might already be in the public domain, because (a) the information falling within this exemption is not publicly available and (b) it would be impossible for us to make the information anonymous, as the firm is a large product provider and those in the financial services industry, particularly advisers, are likely to be able to identify the firm as the source. In addition, I can confirm that in this case we do not have consent of the firm to disclose the information.

Therefore, provided the criteria for information being “confidential” set out in section 348 FSMA are met, which in this case I consider they are, there is a statutory bar on the FCA disclosing the information. As such, I am satisfied that section 44(1)(a) of the Act applies to some of the information requested. As section 44 of the Act is an absolute exemption, there is no need for the FCA to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it.