

FOI Helpline: 0207 066 8080  
Email: FreedomofInformationAppeals@fca.org.uk

7 March 2018

(Via e-mail)

Our Ref: FOI5391

Your Ref:

Dear

### **Freedom of Information: internal review**

I refer to your e-mail dated 17 January 2018 concerning the Financial Conduct Authority's ("FCA") decision of the 12 January 2018 provided in response to the information you requested under the Freedom of Information Act 2000 ("the Act"). A copy of your original request, dated 22 October 2017, together with the eight questions that you raise in your e-mail of 17 January, are set out in Annex A to this letter.

You also wrote to us on 4, 8 and 12 January 2018, 18 and 19 December 2017, and 23 and 28 November 2017. Our responses dated 4 January 2018, 18 December 2017, and 20 and 28 November 2017 also refer.

### **Preliminary**

We originally wrote to you on 20 November 2017 to inform you that we hold the information requested but that some or all this may be exempt from disclosure as section 31 (Law enforcement) of the Act may apply. As we explained, this is a qualified exemption and we needed additional time to consider, as required by the Act, in all the circumstances of the case the balance of the public interest in maintaining the exemption against the public interest in disclosing any information.

I am sorry for the length of time that it took to complete this exercise but I see that we kept you updated on our progress and apologised for the delays. We were also able to provide you with advice and assistance, outside of the Act's regime and in advance of our final response, in reply to Questions 2 and 3 of your original request. In addition, our final response, dated 12 January 2018 (covering a letter dated 10 January 2018), provided some additional clarification on Questions 2 and 3.

Our final response also provided some information in response to Question 1 of your original request. We explained, however, that the transcripts contained in the enclosed Annex B contained redactions to remove information which is exempt from disclosure under section

40(2)(b) (Personal information), section 44 (Prohibitions on disclosure), section 43 (Commercial interests), and section 31(2) of the Act. In terms of the qualified exemptions in sections 31 and 43 of the Act, we informed you that the public interest in favour of disclosure is outweighed by the public interest in maintaining the (relevant) exemption.

With regard to Question 4 of your original request, we informed you that we have previously disclosed publicly that we have concerns about payment services firms who may have used currency converter tools in relation to their currency transfer services in a potentially misleading way. We also confirmed that, within the timeframe relevant to your request, we have commenced six investigations in relation to potentially misleading financial promotions through the use of the interbank rate in online currency converter tools and other promotional material. Some of these investigations have been completed and those firms have stopped promoting their business through the use of interbank rates. We explained that we are unable to provide specific information about these investigations, including the names of the firms, as we consider that the identification of any of the firms involved would, or would be likely to, prejudice the commercial interests of the firms concerned, and therefore the exemption set out at section 43 of the Act applies. Furthermore, disclosure of this information relating to ongoing investigations would, or would be likely to, prejudice the exercise by the FCA of its regulatory functions and is therefore exempt from disclosure under section 31 of the Act.

You wrote to us on the 17 January 2018 to question our response and set out eight further questions for us to address and / or to provide an explanation. In summary, you believe our response is wholly inadequate. You say its general tone is an exercise in finding excuses to withhold information rather than to be open, honest and transparent with the public. You argue this is not what consumers, or firms, need from the financial regulator. You state the FCA exists to protect consumers, and authorised firms who contribute to its costs. Both have a right to transparency and honesty.

### **Internal review**

I have undertaken a review of our various responses to your original request and, in particular, our final reply dated 12 January 2018, together with the points you raise in your e-mail dated 17 January 2018.

I have noted your comments and observations. However, I should explain that the rights under the Act only attract to requests for recorded information held by the public authority (in this case the FCA) rather than the provision of explanations or answers to questions posed. We note, however, that you are dissatisfied with our various responses. For expediency, I have therefore treated the whole of your e-mail of the 17 January 2018 as a request for an internal review under the Act. That said, in terms of Questions 4 to 7, I have provided you below with further advice and assistance outside of the Act.

I should also explain that, in most cases, the FCA is required to consider requests for information made under the Act without reference to the identity or motives of the requester. Public authorities (such as the FCA) 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 the impact of providing the material to the requester.

## Outcome

Turning now to your e-mail dated 17 January 2018, in terms of Questions 1 to 3 and Question 8, the outcome of my review is that I am satisfied that the decision was correct to withhold from disclosure certain information that you have requested as this is exempt under the sections of the Act that we cited previously.

### *Question 1 of original request dated 22 October 2017*

However, in terms of your original request, dated 22 October 2017, I am now able to provide you with the majority of the information we hold in relation to Question 1. This is provided in Annex C to this letter. I have explained this more fully below.

The information that falls within section 44(1)(a) is "confidential information" received by the FCA for the purposes of or in the discharge of the FCA's functions under section 91 of the Financial Services (Banking Reform) Act 2013 ("FSBRA"). Section 91(1) FSBRA allows disclosure of "confidential information" with the consent of (a) the person from whom the primary recipient obtained the information, and (b) if different, the person to whom it relates. In this case this is the firms to which the information relates and the Advertising Standards Authority ("ASA"), from whom we received the information. The ASA has however given consent to disclosure of some information. Section 44 of the Act therefore continues to apply in respect of information where consent has not been given.

In terms of the qualified exemption in section 31 of the Act, the majority of the disputed withheld information relating to Question 1 can now be disclosed. We have reassessed the public interest in maintaining the exemption against the public interest in disclosure and believe this is now balanced in favour of the latter. The FCA recognises that there is a public interest in accountability and transparency, particularly where this contributes to increasing awareness and understanding of the FCA's use of its statutory powers in respect of the financial services sector. We have also taken into account that this information is mainly of historic interest only so would not prejudice our current or future work, and regulatory functions, in this area.

For the remaining information falling within the scope of Question 1 of your original request, where the qualified exemption in section 31 the Act continues to apply, I am satisfied that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

In addition, under section 40(2)(b) of the Act we have redacted from the disclosures in Annex C the names, titles and contact details of ASA staff as well as the names of FCA staff below management level and their direct FCA telephone numbers.

### *Question 4 of original request dated 22 October 2017*

Turning now to Question 4 of your original request, I am satisfied that the qualified exemptions in sections 31 and 43 of the Act continue to apply to the information requested. I am also satisfied that, in this case, the public interest in favour of disclosure continues to be outweighed by the public interest in maintaining the (relevant) exemption.

I will not lengthen this letter by repeating all the points that we made in our final response about the exemptions cited. However, I have set out in Annex B to this letter my analysis of why these continue to apply to certain aspects of the information you have requested.

*Questions 1 to 3 and Question 8 of your e-mail dated 17 January 2018*

Firstly, I believe it may be helpful if I state at the outset that we value the role that the general public, including complainants, can play in ensuring financial services firms are regulated effectively. Receiving this type of information plays a key part in helping us achieve our objective of protecting and enhancing the integrity of the UK financial system.

That said, the FCA supervises the conduct of over 50,000 firms and, as you will appreciate, we do not have the resources to take action on every piece of information we receive. So we have to take a risk-based approach to decide when to take action and, if so, what action to take. We have a range of formal powers and options available. These range from prosecuting individuals to levying fines on individuals or firms, removing a firm's permission to undertake certain types of business or banning individuals from further work in the financial services industry. We publish these outcomes on our website.

But in many cases where we discover wrongdoing or misconduct, we pursue early intervention and remedial opportunities which enable us to address the poor conduct or regulatory failures in a cost-effective and resource-efficient manner. These early interventions are usually achieved without the need to use our formal powers, which means that the outcome will not usually be published on our website. It is the policy of the Financial Services and Markets Act 2000 ("FSMA") and the Financial Services (Banking Reform) Act 2013 ("FSBRA") that the views of the FCA in relation to the conduct of those it regulates should remain private unless and until a final decision to take formal enforcement action has been reached. Even then, the FCA should not publish information or otherwise make information available if to do so would be "unfair". There is, if you like, a trade-off between putting things right quickly, which benefits consumers or potential consumers, and the firm being given no adverse publicity by the FCA.

I have also taken into account that the withheld information relates to issues that remain current. The information is accordingly not of historic interest only. The subject matter of your request is particularly time sensitive. The issues are on-going around the FCA's / ASA's regulation of payment services firms, and more generally the relevant legal and regulatory framework in which Payment Institutions and Electronic-Money Firms operate.

Finally, I have also taken into account that the FOI Act is motive and applicant 'blind', and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore a public authority (the FCA in this case) can only disclose or confirm or deny it holds information under the Act if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it. My decision and our previous responses have been made on this basis.

I say more about the application of the exemptions cited in relation to these questions, and Questions 1 and 4 of your original request, in Annex B of this letter.

#### *Questions 4 to 7 of your e-mail dated 17 January 2018*

These questions (as set out in Annex A to this letter) are not a request for recorded information under the Act. However, to be helpful I answer these below as "routine correspondence".

#### *Question 4*

As set out in our final previous response to you dated 12 January 2018 (covering a letter dated 10 January 2018), the Advertising Standards Authority ("ASA") made a decision that "as of 22 July 2016, complaints about misleading non-broadcast advertising for [payment] services will be referred to the FCA for its consideration". Confirmation of this can be seen on the ASA's website [here](#). However, also as advised in our previous response, we have publicly set out the relevant legal and regulatory framework in which Payment Institutions and Electronic-Money Firms operate; most recently in our statement dated 19 July 2017, which can be seen [here](#). We have also made it clear that all firms undertaking currency transfer services must comply with the Consumer Protection from Unfair Trading Regulations 2008 ("CPRs"). Payment Institutions and Electronic-Money Firms were required to comply with both the ASA's UK Advertising Codes and the CPRs prior to the ASA's decision highlighted above. This requirement, subsequent to the ASA's decision, remains the same.

#### *Question 5*

As set out in our previous responses to you, we have informed you that we deal with complaints concerning Payment Institutions and Electronic-Money Firms in the same way as other financial promotions which fall within our remit. We consider all individual complaints brought to our attention to ascertain whether the advertisement being complained about is compliant with our rules or the relevant law (as appropriate). Given that our aim is to use our tools efficiently and cost-effectively, in a way that delivers the greatest value to the public, we are unable to take all concerns forward. We carry out this exercise in the same way whether the firm is regulated under the Payment Services Regulations or the Financial Services and Markets Act 2000. In other words, we do consider all individual complaints we receive, and indeed value any intelligence that consumers and other parties bring to our attention, as it helps us in our work. Where consumers identify any instances of non-compliance, we request that these are reported to us via a form on our website at <https://www.fca.org.uk/consumers/misleading-financial-adverts/report>. We will then consider these complaints once we receive them. Usually we can address non-compliance through informal means, such as writing to firms highlighting our concerns and requesting that they take action. We may, however, look to take more formal action. Details of the range of formal enforcement powers available to us can be found [here](#).

#### *Questions 6 and 7*

In our final response letter (referred to above), we advised you that we had commenced six investigations into potentially misleading financial promotions through the use of the interbank rate in online currency converter tools and other promotional material. We also noted that in these cases we cannot impose financial penalties or other disciplinary sanctions. Whilst we do have a power to impose financial penalties on payment services firms under the Payment Services Regulations ("the Regulations") we can only seek to

exercise that power when a 'requirement' imposed on a firm, by or under the Regulations has been breached. The Regulations do not contain any express requirements around financial promotions and therefore in this context, we are unable to impose a financial penalty. Similarly, although the FCA is able to publicly censure payment services firms for a breach of a requirement because there are no specific financial promotion requirements imposed by or under these Regulations we are unable to issue a public censure in these cases.

The Payment Services Regulations and the Consumer Protection from Unfair Trading Regulations 2008 ("the CPRs") are separate regulations and impose distinct requirements on firms. A breach of the CPRs is not a de facto breach of the Regulations. However, a breach of the CPRs may be relevant to whether a firm meets or continues to meet the conditions for authorisation.

We have set out previously why we are unable to provide specific information about the six investigations, including the names of the firms. I have also explained in this letter that I am satisfied that the decision was correct to withhold from disclosure this information, and the exemptions that apply under the FOI Act and the reasons why.

### Conclusion

To conclude, I am satisfied that our response, dated 12 January 2018, was correct stating that the sections of the Act we have cited were engaged in respect of the information you requested. That is, in relation to Questions 1 and 4 of your original request dated 22 October 2017; and Questions 1 to 3 and Question 8 of your complaint dated 17 January 2018. However, I am also satisfied that we can now provide you with the majority of the information we hold in relation to Question 1 of your original request.

If you are not content with the outcome of the internal review in relation to the request for information under the Act (as defined above), 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](http://www.ico.org.uk)*

I also hope the explanations I have provided, outside of the Act, about Questions 4 to 7 of your e-mail dated 17 January 2018, are helpful.

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

Yours sincerely

**Internal Reviewer**

**Financial Conduct Authority**

**Freedom of Information Request – (FOI5391)**

Original request dated 22 October 2017

- “1. Transcripts of communications between the FCA and the Advertising Standards Authority (ASA) from May to July 2016 which culminated in the handing over of complaints investigations in the payment services sector from the ASA to the FCA.
2. The updated MOU between the FCA and the ASA which includes the decision made in point 1. above.
3. Clarification as to who is now the competent authority for investigating advertising complaints about the payment services sector.
4. A list of payment services firms which the FCA has investigated for misleading advertising and the results of those investigations.”

Complaint / internal review request dated 17 January 2018

“Unfortunately, you have not provided the information I requested, nor given any good reason why you should not provide such information.

Specifically:

1. I asked for all communications between the FCA and the ASA, not just from the FCA. These should be in the public domain as they detail the decision process behind two agencies, whose role is consumer protection, when deciding to change the level of protection offered to consumers for misleading advertising. Please therefore provide the communications from the ASA for the requested time period.
2. The emails from the FCA are so redacted as to be worthless. There is no good reason to redact anything unless it specifically refers to named firms or individuals. You have hidden material information from the public which has a right to know for consumer protection, and from firms which have a right to know so that they can comply with the relevant regime. Such redactions can only be in the FCA’s interest and suggests, as it is not being open and honest with the public, that it has something to hide. Simply changing the lead regulator for misleading advertising with no explanation as to why is not acceptable. Please therefore provide the redacted information.
3. Why has it taken you almost three months to tell me there is no formal agreement between the FCA and the ASA? I am also concerned that you appear not to understand that the existing MOU is entirely irrelevant to the payment services sector. Please explain why you considered that it is, including whether it is a training and competency issue on the part of the FCA.

4. As you have now admitted that there is no formal agreement in place between the two agencies, please answer my question as to which agency is now the lead regulator for investigating complaints about misleading advertising in the payment services sector.
5. Following on from that, as there is no formal agreement, please give details of the FCA's process and service level agreement for investigating misleading advertising complaints in the payment services sector, as well as what new processes / resources / training have been put in place since July 2016 to ensure that the FCA has been able to take over from the ASA with no drop in standards, or state that the FCA has made no such provision.
6. You say that you are unable to impose financial penalties on the firms investigated for misleading advertising. Yet the Payment Services Regulations clearly state that the FCA is able to impose fines. Please see page 69 of the Regulations 2017 which reads:

*Financial penalties 111.—(1) The FCA may impose a penalty of such amount as it considers appropriate on— (a) a payment service provider who has contravened a requirement imposed on them by or under these Regulations;*

Breach of the CPRs is a contravention of a requirement of the Regulations. The only restriction is that a firm cannot have its authorisation removed and incur a financial penalty. As the FCA has not removed authorisations from any offending firms, I am at a loss to understand why you believe you cannot impose fines. Please therefore explain why you think you are unable to impose financial penalties.

7. Why are you also not able to issue a Final Notice or publicise the names of the firms involved? Again on page 69 the Regulations state:

*Public censure 110. If the FCA considers that a person has contravened a requirement imposed on them by or under these Regulations, the FCA may publish a statement to that effect.*

Please explain therefore why you think you are unable to name offending firms.

8. You state that publishing the names of offending firms may harm their commercial interest. With respect, that is the point! It is consumers, not the regulator, who should decide the commercial success of a firm. Consumers need to be able to make an informed decision about whether to enter into a commercial transaction with a particular firm, and that firm's regulatory record is material to the decision. That decision should be the consumer's and not the FCA's to make on behalf of the consumer. Further, by refusing to name and shame rogue firms, you are actually protecting them and their commercial interest to the detriment of consumers and the commercial interest of compliant firms including my own. Please therefore supply the names of the firms that have been investigated by the FCA for misleading advertising, and the outcomes.

In summary, your response is wholly inadequate. Its general tone is an exercise in finding excuses to withhold information rather than to be open, honest and transparent with the public. This is not what consumers, or firms, need from the financial regulator. The FCA exists to protect consumers, and authorised firms contribute to its costs. Both have a right to transparency and honesty.



Please provide the information requested, within a reasonable timeframe of 10 working days from this email, or advise on your complaints process in particular what steps are available for a formal review of your response by the Information Commissioner's Office."

## Annex B

### **FOI5391: Exemptions to disclosure applying to request for information, dated 22 October 2017 (see Annex A for details)**

This annex provides more detail on the exemptions in sections 31, 43, 40 and 44 of the Freedom of Information Act 2000 ("the Act") applied to the information requested from the FCA with the reference FOI5391.

#### Section 31 (Law enforcement)

Section 31 of the Act provides that information is exempt information if its disclosure would, or would be likely to, prejudice the matters mentioned in section 31(1). Paragraph 31(1)(g) (the exercise by the FCA, as a public authority of its functions for any of the purposes specified in section 31(2)) is especially relevant here.

The harm to our function of "ascertaining" or monitoring compliance with our regulatory requirements would be likely to occur either over time or during any ongoing investigation because public disclosure would lead to a loss of flexibility and judgment by the FCA in the use of our supervisory or enforcement processes, or could lead the subjects or potential subjects or third parties to act in a way which might harm the conduct of our regulatory functions. The FCA has a variety of regulatory powers available to achieve outcomes that protect consumers and ensure markets work well. It is therefore crucial that this flexibility and judgement is not harmed or inhibited in any way.

I am also of the opinion that prejudice and disruption would be likely to arise to the FCA's regulatory functions from a full disclosure of the information requested, as this could impact on the flow of information the FCA receives as part of its role as the UK's financial regulator. The Information Commissioner understands that a regulatory body will be dependent on its communications to and from (and about) persons that operate in the financial services sector, and the public generally, being full and frank in nature so that it can effectively provide advice, investigate and consider any abuses of its regulatory requirements. The Commissioner has previously recognised and allowed the argument which says that disclosure could have a prejudicial effect where it could slow down a public authority's regulatory process and may lead to less timely regulatory action or otherwise impact on the FCA's ability to protect consumers and ensure markets work well.

In addition, the FCA does not usually publish its views in relation to the conduct of those it regulates until a final decision to take formal enforcement action has been reached; and even then it should not publish information if to do so would be "unfair". In this respect the requirements of the Financial Services and Markets Act 2000 ("FSMA") and the Financial Services (Banking Reform) Act 2013 ("FSBRA"), and the FCA's policy in relation to the enforcement process, are fully recognised and accepted by the Information Commissioner and the Upper Tribunal.

Given this, I consider the decision is correct to withhold under section 31 of the Act some of the information in respect of Question 1 and that related to Question 4 of your original information request. I am satisfied that the prejudice being claimed is not trivial or insignificant and that disclosure of the information requested would be likely to lead to the harmful consequences claimed.

### *Public interest arguments*

As section 31 is a qualified exemption, and where this exemption continues to apply, I have considered the public interest in maintaining the exemption against the public interest in disclosure.

The Information Commissioner has previously recognised and allowed the argument which says that disclosure could have a prejudicial effect where it could slow down a public authority's regulatory process and may lead to less timely regulatory action. This point was reinforced by the Commissioner in the decision relating to FS501848982 (paragraph 94), which involved the Charity Commission.

In addition, the Decision Notice FS50673940 (see <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014403/fs50673940.pdf>), dated 29 June 2017, concerns the Commissioner's decision that the FCA correctly applied section 31 of the Act. Whilst the case in that decision was different, the public interest arguments considered by the Commissioner are equally valid here. In that case, the Commissioner considered that there was a strong public interest in the FCA operating openly and being accountable in its effectiveness in carrying out its statutory functions. She considered however that there was a strong public interest in not disclosing information where this would be likely to impede the FCA's ability to carry out its functions effectively.

The FCA recognises that there is a public interest in accountability and transparency, particularly where this contributes to increasing awareness and understanding of the FCA's use of its statutory powers in respect of the financial services sector. The FCA has a number of publicised policies and structures in place to ensure that it and the firms and individuals that it regulates are compliant with the legislation under which it operates. As such, there are already sufficient transparency, safeguards and public accountability to ensure that the FCA is exercising its functions appropriately, fairly and proportionately. The FCA also already makes available a substantial amount of information to enable firms, consumers and the FCA's key stakeholders to understand how it operates and what can be expected of it in return. This includes a "Consumer" part of our website, which has sections on how consumers can protect themselves when dealing with firms operating in the financial services sector: <https://www.fca.org.uk/consumers>.

Where any formal regulatory action is taken against a firm or an individual, the public is (save in exceptional circumstances) informed of the final outcome of the proceedings. For example our Final Notices (and more recently, some Decision Notices) are published on the FCA website and may be widely reported in the press. This serves to promote the public interest in transparency of regulatory action, in accordance with due legal process.

The arguments in favour of maintaining the exemption include that if firms, individuals or other third parties became aware that information obtained or created as part of our regulatory functions may be disclosed under the Act, they may be less open and uninhibited in the exchanges with the FCA. This could impact on the flow and quality of the information the FCA receives as part of its role as the UK's financial regulator. It is therefore my opinion that it is strongly in the public interest that the FCA is allowed space in which to carry out its regulation of the financial services sector in a largely confidential manner. To do anything that runs contrary to this principle, and therefore to dilute the effectiveness of the FCA, may

ultimately lead to a decline in public confidence in the sector and the FCA's ability to deliver its statutory objectives.

Furthermore, if we were to disclose the names of firms which we were investigating or considering for investigation, that could prejudice any action we did want to take. This is because the firm would challenge the fairness or propriety of our formal action on the basis that we have used prior, public disclosure under the Act in a way which has taken away their expectation of confidentiality in relation to formal action which is provided by FSMA. Such a challenge would risk complicating, prolonging and even frustrating formal action. It is therefore not in the public interest to name firms unless FSMA allows this.

To conclude, I am of the view that there is a strong public interest in the FCA being able to enforce the regulatory requirements that it is responsible for and in not disclosing publicly information which could harm such action. It follows that I consider that the public interest in favour of disclosure is outweighed by the public interest in maintaining the section 31 exemption where this continues to apply.

#### Section 43 (Commercial interests)

In addition, I consider that the information requested in relation to Question 4 of your original request, if disclosed, would be likely to prejudice the commercial interests of any person (and specifically in this case, the six (unnamed) firms to which I refer in this letter, and in our previous responses, to your request).

In the case of the information you have requested concerning Question 4 of your original request, we believe that the commercial prejudice would not be trivial or insignificant and disclosure would be likely to lead to the harmful consequences that the exemption in section 43 of the Act is there to prevent. I have set out above the strong grounds we believe that exist for not providing you with the information you are seeking; these apply equally in our use of the exemption in section 43(2) of the Act.

#### *Public interest arguments*

In the course of investigations by the Information Commissioner and in appeals before the Information Tribunal, our experience is that, because of the importance of the reputation of regulated firms operating in the financial sector, if negative information (in any form) were to be disclosed by the FCA, it has been accepted that this could harm the commercial interests of the firms concerned. This may also have a damaging impact on their consumers and other stakeholders and the financial markets more generally.

I have also taken into account the Information Commissioner's Decision Notice FS50620058 involving the FCA, dated 5 September 2016 (see <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624988/fs50620058.pdf>). This concerns the Commissioner's decision that the FCA correctly applied the exclusion in section 43 of the Act. In that decision, the Commissioner noted in support of this position, the FCA pointed to the views of the Information Tribunal in a previous case, where the Tribunal put specific emphasis on the importance of the legal framework in which the former Financial Services Authority, and now the FCA, operates; in particular the requirements of section 348 of Financial Services and Markets Act 2000 (and by analogy section 91 of the Financial Services (Banking Reform) Act 2013), which details the confidential nature of the information held by the FCA.

The Commissioner understands that where a firm is investigated and any complaints are upheld the FCA publishes its findings. However, a final decision is only published once the firm has had the opportunity to formally comment on the FCA's preliminary findings. This process means that the FCA only makes its findings public where the actions of the party under investigation warrant doing so and after a fair process has been followed. To reveal the existence of an investigation, and prompt speculation and damaging adverse comments, in other circumstances would be unfair.

In conclusion, when considering the public interest in respect of section 43, the Commissioner noted that she is focused on the public interest in preventing a prejudice to the commercial interests of the relevant firm and the public interest in not interfering in the operation of the financial services market. In that case, she was satisfied there was some public interest in the FCA confirming or denying whether it had or was investigating an alleged breach by a named firm but this has to be weighed against the public interest in preventing a prejudice to the commercial interests of that firm and the impact of this on the operation of the financial services market. I believe the same considerations are of relevance here, in respect of your own request.

#### 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, job titles and contact details of ASA staff together with the names of FCA staff below management level and their direct FCA telephone numbers.

The relevant staff have a reasonable expectation that the personal information relating to their 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. 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 44 (Information prohibited from disclosure by or under any enactment)

As explained in our final response, section 44(1)(a) of the Act provides that information is absolutely exempt if its disclosure (otherwise than under the Act) is prohibited by or under any enactment.

I am satisfied that the information you have requested falls within section 44(1)(a), as it is information received by the FCA for the purposes of or in the discharge of the FCA's functions and so is "confidential" under section 91 of the Financial Services (Banking Reform) Act 2013 ("FSBRA"). Under section 91(5)(b) FSBRA the FCA is identified as a primary recipient for the purposes of Part 5 FSBRA and therefore section 91(1).

It may be of help to clarify that the confidentiality regime in FSBRA, 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 91 FSBRA are met, the restriction on disclosure applies. In this case, the confidential information relates to the sensitive information received by the FCA from the Advertising Standards Authority ("ASA"). I am therefore satisfied that this meets the test in section 91 for the information to be "confidential".

If I may, I should also like to address section 91(4) FSBRA. Section 91(4) 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 is not possible for us to make the information anonymous as it relates to the person (i.e. the ASA) named in Question 1 of your original request.

In so doing I have also taking into account that the Information Commissioner has recognised that some information when taken in isolation is not likely to be harmful on its own but may be harmful when combined with other information already in the public domain or known to a limited group of people. This is sometimes known as a "mosaic" or "jigsaw" effect. Public bodies, such as the FCA, are therefore entitled to look at the effect of the proposed disclosure in the context of existing information already in the public domain.

In terms of consent, as part of the internal review process we have consulted the ASA. I can confirm that, in this case, consent to disclosure has been provided for some information.

Therefore, provided the criteria for information being "confidential" set out in section 91 FSBRA are met, which in this case I consider they are, there is a statutory bar from the FCA disclosing confidential information we have received from an external party, such as the ASA, and relates to its or another party's business or other affairs. As such, I am satisfied that the FCA has correctly applied section 44(1)(a) of the Act to protect from disclosure some information falling within Question 1 of your requested.