

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 February 2013

Public Authority: The Financial Reporting Council Limited

Address: Aldwych House
71-91 Aldwych
London
WC2B 4HN

Decision (including any steps ordered)

1. The complainant requested information held by the Professional Oversight Board about a named international accountancy and accountancy examining body. The Financial Reporting Council disclosed some information within the scope of the request but also withheld some information citing sections 44 (prohibitions on disclosure), 41 (information provided in confidence), 31 (law enforcement), 36 (prejudice to effective conduct of public affairs) and 40 (personal information). It also stated that although some of the requested information related to functions it carries out, those functions fall outside of its designation under FOIA.
2. The Commissioner's decision is that the FRC was entitled to determine that some of the requested information was outside the scope of its responsibilities under FOIA. He also concluded that it correctly withheld the remaining disputed information in accordance with section 36. He requires no steps to be taken, including in respect of the timeliness issue which he has considered.

Request and response

3. On 13 March 2012, the complainant (a firm of solicitors acting on behalf of its client) wrote to the Professional Oversight Board (POB) and requested information in the following terms:

"Meanwhile, following up on the meeting, and notwithstanding the above, my client would wish to obtain:

- *copies of any communication between POB and other RQBs/RQB's that refer to the Association of International Accountants;*
- *copies of any internal reports or records of discussions regarding the AIA qualification; and*
- *any communication between the POB and the CCAB that has occurred during the past three years on issues relating to regulation of the RQBs and the wider accountancy profession.*

Accordingly would you treat this letter as a request for those documents under the Freedom of Information Act”.

4. The POB – an operating body of the Financial Reporting Council (FRC) at the time of the request - provided its substantive response on 20 April 2012. It confirmed that it holds information within the scope of the first two parts of the request. It denied holding information relating to regulation of the RQBs in the last three years. It also told the complainant that:

“Correspondence with the CCAB in relation to the regulation of the wider accountancy profession is not within the scope of the POB’s designation under the FOIA”.

5. With respect to the information it holds within the scope of the first two parts of the request, it provided some information but refused to provide the remainder. It cited the following exemptions as its basis for doing so:
 - section 44 prohibitions on disclosure;
 - section 41 information provided in confidence;
 - section 31 law enforcement;
 - section 36 prejudice to effective conduct of public affairs; and
 - section 40 personal information.
6. With respect to the first part of the request, the FRC told the complainant that the information it holds within scope of that part of the request comprises five pieces of correspondence.
7. With respect to the second part of the request, the FRC told the complainant that the information it holds includes *“internal emails, draft reports, file notes, Board papers and minutes of Board meetings”.*

8. It advised that if the complainant was not happy with the way the request for information had been handled, it could request a review by the FRC.
9. Following an internal review the FRC wrote to the complainant on 29 June 2012, upholding the POB's original position. With respect to the information requested in the third part of the request, the FRC responded in more detail about that aspect of the request. It explained that, in its view, the wider accountancy profession is not covered by the POB's statutory duties - those being limited to the audit function. It therefore argued that it is not covered by FOIA in respect of the information requested in that part of the request.

Background

10. Of the terms used in the request, 'AIA' means the Association of International Accountants. The term 'RQB' means a recognised qualifying body for the purposes of Part 42 of the Companies Act 2006 (CA) respectively. The AIA is an RQB.
11. 'CCAB' is the acronym for the Consultative Committee of Accountancy Bodies.
12. 'RSB' means responsible supervisory body.

Scope of the case

13. The complainant contacted the Commissioner on 10 August 2012 to complain about the way its client's request for information had been handled.
14. During the course of his investigation, the FRC advised the Commissioner that the POB no longer exists. It also advised that the statutory powers previously delegated to the POB are now delegated to the FRC. Accordingly the Commissioner considers that the relevant public authority in this case is the FRC.
15. In summary, the complainant disputes the FRC's application of all the exemptions cited in relation to the first two parts of the request.
16. With respect to the FRC's citing of section 36, the complainant complained about the way that process appeared to have been conducted, noting in particular:

"The power to apply a section 36 exemption under the FOIA is explicitly given to the Chair of the POB, however the Chair has not signed any document setting out the grounds and reasons for his or her opinion".

17. With respect to the third part of the request, the complainant does not accept that correspondence with the CCAB in relation to the regulation of the wider accountancy profession falls outside of the FRC's designation under FOIA. For the purposes of this decision notice, the Commissioner will refer to that information as 'the wider accountancy profession' information.
18. The complainant also brought to the Commissioner's attention the timeliness with which the FRC handled its request for information.
19. The Commissioner acknowledges the level of engagement demonstrated by both parties in this case during the course of his investigation: each provided the Commissioner with comprehensive submissions for him to consider.
20. The Commissioner considers the scope of his investigation to be the FRC's citing of sections 31, 36, 40, 41 and 44 as a basis for withholding information within the scope of the first two parts of the request. He has also considered the FRC's view regarding 'the wider accountancy profession' information.

Reasons for decision

Section 5 Further power to designate public authorities

21. Section 1(1) of FOIA creates a general right of access to information held by public authorities. It states that:

"Any person making a request for information to a public authority is entitled –

to be informed in writing by the public authority whether it holds information of the description specified in the request, and

if that is the case, to have that information communicated to him."

22. Section 3 of FOIA states:

"(1) In this Act "public authority" means—

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6."

23. The Commissioner considers that section 3(1)(a)(ii) (designation by order under section 5) is relevant in this case.
24. Under section 5 of FOIA the Secretary of State can, by order, designate bodies as public authorities. These are bodies that appear to be exercising functions of a public nature or who are providing, under contract with a public authority, any service whose provision is a function of that authority. This is the means by which bodies that are not listed in Schedule 1, and cannot be added to that Schedule by order under section 4, are brought under the provisions of FOIA.
25. Section 7(5) of FOIA states:
- "An order under section 5(1)(a) must specify the functions of the public authority designated by the order with respect to which the designation is to have effect; and nothing in Parts I to V of this Act applies to information which is held by the authority but does not relate to the exercise of those functions".*

The FRC's designation as a public authority

26. The FRC is designated as a public authority under section 5 of FOIA in relation to its exercise of those statutory functions delegated to it under Part 42 Companies Act 2006 (section 1252(3)) and the exercise of the functions pursuant to its appointment as the Independent Supervisor (section 1228(3)).
27. Section 1252(3) of the Companies Act (CA) 2006 states:
- "1252 Delegation of the Secretary of State's functions*
- (3) A delegation order has the effect of making the body designated by the order designated under section 5 of the Freedom of Information Act 2000 (c. 36) (further powers to designate public authorities)."*
28. Section 1228(3) of the Companies Act 2006 states:
- "1228 Appointment of the Independent Supervisor*
- (3) The order has the effect of making the body appointed under subsection (1) designated under section 5 of the Freedom of*

Information Act 2000 (c. 36) (further powers to designate public authorities)".

29. In correspondence with the Commissioner, the FRC explained that the Secretary of State:

"has delegated to the FRC certain responsibilities and powers set out in Part 42 of the CA 2006 under 'The Statutory Auditors (Amendment of Companies Act 2006 and Delegation of Functions etc.) Order 2012' (the 2012 Designation Order) which has now replaced the 'Statutory Auditors (Delegation of Functions etc.) Order 2008' (the 2008 Designation Order)

and that:

"The principal responsibility delegated to the FRC under part 42 of the CA 2006 is to recognise and oversee the regulation of statutory auditors by RSBs and, (in respect of qualifications), RQBs".

30. It also explained that:

"The POB was an operating body of the FRC and carried out functions delegated to it under Part 42 of the CA 2006. The FRC has recently reorganised, and the POB no longer exists. The statutory powers previously delegated to the POB are now delegated to the FRC".

31. It is not in dispute that, in accordance with section 5, the FRC is designated as a public authority with responsibilities under FOIA. It is also accepted that the FRC conducts statutory functions delegated by the Secretary of State in accordance with Part 42 of the Companies Act 2006.

32. What is in dispute is the extent to which the FRC's responsibilities under FOIA relate to those delegated functions.

The FRC's responsibilities under FOIA

33. The FRC told the Commissioner that, in its view:

"The FRC's correspondence with the CCAB in relation to the wider accountancy profession does not fall within the statutory functions delegated to the FRC under part 42 of the CA 2006".

34. In contrast, the complainant argued generically that "accountancy and audit cannot be separated" and that:

"legislation relating to the oversight of the audit profession does not restrict that oversight to audit".

35. The Commissioner acknowledges that the 2012 Delegation Order does not clearly specify which of its delegated functions the FRC is to be treated as designated under section 5 of FOIA.
36. In his view, as the 2012 Delegation Order does not clearly specify which of the FRC's functions are designated for the purpose of FOIA, it is necessary to consider the intention behind the legislation. In his view, the designation can be interpreted in one of three ways. Those are that the designation is intended to:
 - cover all of the FRC's activities;
 - cover none of its activities; or
 - cover just those activities that are delegated by that Order.
37. In the Commissioner's view, the first of those options is unlikely to have been the intended consequence of the legislation given that provision exists within FOIA to enable a body to be designated in respect of some but not all of its functions and prior to the 2012 Delegation Order none of the FRC's functions were covered by FOIA. He also considers it unlikely that the intention of the legislation was that none of the FRC's functions were covered by the FOIA - the second option - given that provision is made in the CA for a delegation order to have the effect of designating the body under section 5 FOIA.
38. Having considered the matter, and in the absence of clear direction, the Commissioner considers that it is logical to conclude that the intention behind the 2012 Delegation Order is that it should set out not only which functions are delegated to the FRC but also which functions are intended to be covered by the section 5 designation as a public authority. In other words he considers that the FRC is only subject to the FOIA in respect of those statutory functions delegated to it under part 42 of the Companies Act 2006.
39. It follows that, with respect to the 'wider accountancy profession information', he considers that the FRC was entitled to tell the complainant that such information is not within the scope of its designation under FOIA.

Section 36 Prejudice to effective conduct of public affairs

40. The Commissioner has next considered the exemptions cited by the FRC in this case. The FRC has cited section 36 in respect of all the withheld information in scope of those elements of the request that are within its remit under FOIA.
41. Section 36 is the only exemption in FOIA that requires a determination by a 'qualified person'. The exemption will only apply if the reasonable opinion of a qualified person is that one of the forms of adverse effect specified in subsection 2 would follow from disclosing the information.
42. Section 36(2) is expressed in broad terms, and in order for the opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. The term 'inhibit' is not defined in FOIA. The Commissioner's view is that, in the context of section 36, it means to restrain, decrease or suppress the freedom with which opinions or options are expressed.
43. Section 36(2) states that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(b) would, or would be likely to, inhibit -

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs".
44. In correspondence with the Commissioner, the FRC confirmed that it is relying on section 36(2)(b)(i) and (ii), and section 36(2)(c), in relation to the withheld information comprising internal documents regarding the AIA qualification; and section 36(2)(b)(i) and (c) in relation to the remaining withheld information.
45. In support of its reliance on section 36, the FRC provided the Commissioner with a copy of the submission that was provided to the qualified person and a copy of their response, dated 18 April 2012.
46. Accordingly the Commissioner is satisfied that the Chair of the FRC – the qualified person in this case – was provided with a submission in relation

to the request and that the decision to engage section 36 was exercised by the appropriately authorised person.

47. Information may be exempt under section 36(2)(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. It should be noted that these exemptions are about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views.

48. With respect to part (a) of the request, the qualified person was of the view that disclosure of that information would be likely otherwise to prejudice the effective conduct of public affairs. In this respect, the FRC argued that disclosure:

"is likely to have an impact on the readiness of the RSBs or RQBs to seek advice or share information with POB in the future. This is because those bodies will be more circumspect about sharing information with POB in the future if they believe there is a risk that that information will be published.... Effective regulation relies on POB and the accountancy bodies being able to share views and advice without reservation, efficiently and effectively and in the spirit of co-operation and trust".

49. With respect to some of the information in scope of part (a) of the request, the qualified person was also of the view that release of that information would be likely to prejudice the free and frank provision of advice. It explained that in addition to the information that is provided to the POB for the purposes of its regulatory duties, RQBs and RSBs also seek advice and share information with a view to securing that advice. The FRC argued that disclosure of such information is likely to have an impact on the readiness of the RSBs or RQBs to continue that practice in the future.

50. In respect of part (b) of the request, the qualified person was of the view that disclosure of that information would be likely to inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation or would be likely otherwise to prejudice the effective conduct of public affairs.

51. It argued that disclosure would be likely to inhibit POB staff from discussing their views on findings from monitoring visits or other issues raised over the course of a reporting period.

52. It told the complainant:

"If the information you requested were to be released, POB staff are likely to feel unable to express their views candidly and records of their views and discussions may not be kept for fear of these being placed in the public domain which would undermine the effective working of the POB".

53. With respect to that argument, the Commissioner considers that public officials charged with giving advice are expected to be impartial and robust in discharging their responsibilities and not be deterred from expressing their views by the possibility of future disclosure. He therefore gives limited weight to that argument.

54. Nevertheless, having considered the submission in its totality, the Commissioner accepts that it was reasonable in this case to reach the opinion that the exemption was engaged in relation to all the information withheld by virtue of section 36. Accordingly he has carried the lower level of likelihood – that prejudice or inhibition would be likely to occur - through to the public interest test.

The public interest

55. Even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.

56. Disclosures of information under FOIA are in effect to the world at large and not merely to the individual requester. A requester's private interests are not in themselves the same as the public interest and what may serve those private interests does not necessarily serve a wider public interest. The Commissioner's role is to consider whether or not it is appropriate for the information to be released to the general public.

57. Generally speaking, the public interest is served where access to the information would:

- further the understanding of, and participation in the debate of issues of the day;
- facilitate the accountability and transparency of public authorities for decisions taken by them;
- facilitate accountability and transparency in the spending of public money;

- allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions;
- bring to light information affecting public safety.

Public interest arguments in favour of disclosing the requested information

58. The complainant argued that there is a strong public interest in the POB being accountable for its decisions and for its oversight of the regulation of the auditing profession.
59. It also argued that it is in the public interest that the regulated, including the accounting and auditing professions, should respect and trust the organisations that regulate them.
60. With respect to correspondence within scope of part (a) of the request, the complainant told the Commissioner:

"The use of these exemptions should not be permitted where there is a risk that the exemptions are able to be used to enable a competing organisation and the POB to avoid the FOIA so as to enable competing organisations to criticise a competitor without that correspondence or properly disclosable documents being disclosed. Moreover, the stated aims of the FRC are then lost as a regulated body loses trust in its regulator: there should be no appearance of the FRC protecting the interests of other organisations".

61. The FRC recognises the public interest in transparency, accountability and the promotion of public understanding about its work. It acknowledged in particular that the public should know whether those responsible for regulation of the auditing profession are doing so effectively.

62. However, it argued that those interests:

"are addressed by the POB's review activities undertaken throughout the year and as summarised in its annual report to the Secretary of State which is laid before Parliament and published".

Public interest arguments in favour of maintaining the exemption

63. Arguing in favour of maintaining the exemption, the FRC described the scenario whereby RQBs and RSBs sought advice and shared information with a view to securing that advice. It argued that disclosure would be likely to jeopardise effective regulation by damaging the good working relations between the FRC, RQBs and RSBs.

64. The FRC argued that effective regulation relies on the FRC and the accountancy bodies being able to share views and advice:

"without reservation, efficiently and effectively and in the spirit of cooperation and trust".

65. With reference to the withheld information relating to internal matters, the FRC told the Commissioner that it considered it was in the public interest that members of FRC staff had an internal arena in which to discuss draft materials candidly before settling on a course of action.

Balance of the public interest arguments

66. As the FRC is citing multiple limbs of the exemption, the Commissioner has considered separately, in the case of each limb of the exemption, whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information under consideration.

Balance of the public interest arguments – free and frank provision of advice/exchange of views

67. The Commissioner has considered the public interest arguments in respect of section 36(2)(b). In doing so, he notes that, in this case, the public interest arguments put forward by the FCR in relation to section 36(2)(b)(i) - the free and frank provision of advice - are broadly similar to those cited in relation to section 36(2)(b)(ii) - the free and frank exchange of views.
68. The Commissioner has considered firstly the public interest arguments in respect of the free and frank provision of advice.
69. In the Commissioner's view, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect, he must give weight to that opinion as a valid piece of evidence in his assessment of the balance of the public interest. However, he will also consider the severity, extent and frequency of inhibition to the subject of the effective conduct of public affairs.
70. In balancing the opposing public interest factors in this case, the Commissioner has considered the content of the withheld information as well as the arguments put forward by the FRC and the complainant. He has also taken into account the extent to which further disclosure would be proportionate and the extent to which release of the requested information would further public understanding.
71. Where the severity, extent and frequency of inhibition resulting from disclosure results in prejudice to the ability of the public authority to

conduct itself effectively, this contributes to the argument that maintaining the exemption is in the public interest.

72. On the issue of the severity and extent of the inhibition resulting from disclosure in this case, the Commissioner accepts the importance to the ability of the FRC to function effectively of it being able to request and receive information it reasonably requires for the exercise of its functions.
73. In this respect, the Commissioner acknowledges that the FRC has the power, under the Companies Act, to require any RSB or RQB to provide information it reasonably requires for the exercise of its functions. However, he also recognises the public interest in the FRC not having to use that route to obtain information that may otherwise be freely provided and/or exchanged.
74. Having accepted the qualified person's opinion that the free and frank provision of advice would be likely to be inhibited as a result of disclosure, the Commissioner recognises that the impact of this inhibition could be severe given the frequency with which the FRC seeks information or views from accountancy bodies.
75. The Commissioner is mindful that the issue he must determine with respect to this exemption is whether disclosure in this case would inhibit the processes of providing advice or exchanging views.
76. Taking all the circumstances of the case into account, the Commissioner considers that the desirability for openness and transparency through disclosing the withheld information does not equal or outweigh the harm that disclosure would be likely to cause. The Commissioner therefore concludes that the public interest in maintaining the exemption at section 36(2)(b) outweighs the public interest in disclosing the information.

Balance of the public interest arguments – prejudice to the effective conduct of public affairs

77. As he has come to the conclusion that all of the information falling within the scope of the request has been correctly withheld under section 36 (2)(b)(i) and (ii), the Commissioner has not gone on to consider the public interest arguments in relation to section 36(2)(c).

Time for compliance

78. The complainant told the Commissioner that he was dissatisfied with the way in which the POB:

"sought to manufacture a unilateral extension of time by saying they needed to consider the section 36 exemption, whereas any purported reliance on an exemption should have been confirmed within the statutory timeframe".

79. The Commissioner notes that the request in this case was made on 13 March 2012. The POB responded on 12 April 2012 about the need for additional time to consider the public interest test in relation to the section 36 exemption. It provided its substantive response on 20 April 2012.
80. There is a provision in FOIA, at section 10(3), which allows the 20 working day time limit to be extended to a 'reasonable' time, where the authority is required to apply the public interest test, because one of the 'qualified' exemptions applies. It is important to remember that the extension only gives extra time to consider the public interest test. A public authority cannot claim additional time to consider whether the exemption(s) are engaged. Furthermore, the public interest test is separate from the qualified person's opinion. The qualified person is not required to carry out the public interest test themselves, although they may do so.
81. Where the public authority requires an extension of time, it must issue an initial refusal notice, within 20 working days, explaining why the exemption applies and giving an estimated date by which the public interest test will be completed.
82. In this case, although he acknowledges that the FRC wrote to the complainant within the required timescale, the Commissioner considers that the time for issuing a valid refusal notice was exceeded.

Right of appeal

83. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

84. 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.
85. 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

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