

21 December 2023

Final report by the Complaints Commissioner**Complaint number: 202300510***The complaint*

1. On 6 October 2023, you asked me to review a complaint about the FCA.

What the complaint is about

2. This complaint is connected to
 - a. Complaint FCA00756 (published on my website <https://frccommissioner.org.uk/wp-content/uploads/FCA00756-Issued-12-May-2021.-Published-01-June-2021.pdf>);
 - b. Complaint FCA001421 issued 10 January 2022 which I did not publish;
 - c. Complaint 202300023 (published on my website (<https://frccommissioner.org.uk/wp-content/uploads/202300003-Issued-08-September-2023.-Published-05-October-2023.pdf>)).
3. The FCA summarised your complaint as follows:

You believe the FCA intentionally, or recklessly, misled you and the Complaints Commissioner (OCC) by stating that in 2021, the email diversion was compliant (This matter is relating to FCA Case Reference: 208151062 and OCC Report Reference: FCA000756).

It is your inference that the FCA either made the aforementioned statement with the intention of misleading the OCC into believing the diversion was GDPR compliant or did so recklessly by making an assertion of compliance that could not be supported by evidence and/or an assessment.

As a result, the FCA gave false comfort to both yourself, the OCC and any member of the public who reviewed the aforementioned OCC published report.

To resolve your complaint, you are seeking for the FCA to apologise to both yourself and the OCC, for its conduct on this matter.

In addition, you are seeking for the FCA to issue a publicly available correction to the incorrect assertions made in the OCC's aforementioned published report.

What the regulator decided

4. The FCA referred to my Final Report dated 12 May 2021:

“41. You have alleged bad faith on the part of the FCA. As I have explained above, only a court can make a determination of bad faith. Having said that, I can confirm I have not seen any evidence of bad faith in my review of your complaint, although I believe the FCA's actions in diverting your emails are misguided.”

5. The FCA did not investigate your complaint. It said that your ‘complaint is a continuation of, and directly relates to the complaint you raised with the OCC on 1 January 2021. Consequently, it is my view that a new complaint subject or issue is not being raised here’, and that a ‘conclusion on the investigation procedure had been reached and the complaint is regarded as closed’.

Why you are unhappy with the regulator's decision

6. You have said that the matter you are raising is in fact a new complaint subject. You say ‘As above, the 2021 concern about bad faith was about the FCA's decision to apply email diversions. The new complaint, for which I have not even used the term bad faith, is about the unprofessional behaviour of the FCA in the course of its engagement over the complaint. They're clearly not the same’

My analysis

7. In May 2021 I issued report FCA00756 which said in paragraph 44 that:

‘Matters have been complicated during the investigation of this case due to a number of factors:

- a. Further consideration on the general scope of the complaints scheme which shaped the thinking of how your complaint in part one and two should ultimately be scoped.
- b. The FCA's review of your complaint as one being related to employment issues, when in fact your complaint is much more general in nature.
- c. The FCA's lack of timely clarity on why element four of your complaint about diversion of emails to the Independent Inquiry Team Y fell within the scheme, given that it was not initially clear this was an external team to the FCA. In addition, When the IDT wrote to you it said 'The FCA considers that it is appropriate for the divert to remain in place'. It would have been helpful if the FCA explained that what this meant was that the diversion did not breach any GDPR rules, rather than it is appropriate in all circumstances that the diversion remains in place. That could have been better explained'.

8. In paragraph 44 (c) above, I explained to you that the FCA had said to me that the email diversion, which is the substantive matter at the crux of your complaints, did not breach GDPR rules.
9. You have said subsequently, subject to further interaction you have had with both the FCA and the Information Commissioner's Office, you have reason to believe that this assertion by the FCA is false, and that the FCA has misled me in saying that the email diversion referred to above did not breach any GDPR rules.
10. The FCA has not answered whether its assertion above was correct or not, on the basis that, it contends, this is a matter that has already been reviewed, and that I have already opined on this matter (presumably either specifically or generally) in paragraph 41 of my report as follows:

You have alleged bad faith on the part of the FCA. As I have explained above, only a court can make a determination of bad faith. Having said that, I can confirm I have not seen any evidence of bad faith in my review of your complaint, although I believe the FCA's actions in diverting your emails are misguided.

11. I agree with you that I have not reviewed in report FCA00756 nor any other report issued on your complaint whether or not the FCA's email diversion broke GDPR rules; nor have I tested/investigated its assertion that its diversion of your emails did not break GDPR rules.
12. I did say I had not seen bad faith on the part of the FCA in reviewing your complaint, however, I also said in paragraph 45 that 'For the reasons given above, I cannot review your complaint under the Complaints Scheme the way it is presented', nor could I review the points you raised in paragraph 5. In my therefore limited review, I did not see any evidence of bad faith. I say limited because I have not reviewed whether the email diversion was GDPR compliant. However, in your current complaint, you have not alleged bad faith.
13. You have alleged that the FCA has misled me in claiming that the email diversion it applied to you was GDPR compliant.
14. Whilst it is not within my remit to review whether or not the email diversion was compliant, I nevertheless expect any statements the FCA makes to complainants and to me to be accurate and correct.

My decision

15. This complaint has a long and complicated background, and I have questioned the FCA's judgment as well as its actions throughout, culminating in my finding of maladministration on the part of the FCA for the portion of your complaint which was within the remit of the Scheme. Given this, I am concerned to see that the FCA continues to deflect your complaints rather than take an approach which is helpful and constructive. I do not agree with the FCA that your complaint has been reviewed under the Scheme, and I find it unhelpful that the FCA seeks to assert that it has.
16. The FCA has now agreed with me that this complaint has not been reviewed under the Scheme and has provided an explanation below.
17. I invited the FCA to respond whether the statement that its diversion of your emails did not breach any GDPR rules in my report FCA00756 was correct or not.

18. The FCA has replied in detail, and I attach the relevant extract of its response in the Annex.
19. In summary, the FCA considered it was providing you, and me, with accurate information during my investigation of complaint FCA00756, however, it has now become evident that this information was not accurate due to what the FCA calls an 'honest mistake' rather than deliberately misleading me. The FCA apologised to me and informed me it had apologised to you as well. On this basis, I issued a final report on this matter dated 14 December 2023. You then made representations to me and said that the FCA had not in fact apologised to you for this mistake. I raised the matter with the FCA which conceded the point, and has informed me that it will now make a further apology to you on this matter. It did not apologise to me however, for this second mistake in providing me with incorrect information.
20. I have no reason to doubt the FCA's assertion that these were genuine mistakes, rather than deliberately misleading me. I am however, highly critical of the FCA both for incurring what I consider were largely avoidable mistakes, and failing to acknowledge them to me in an acceptable manner.
21. I am concerned that when the FCA wrote to you in September 2023 to advise you of the mistake, it did not also inform me. I express my strong criticism of this, and the fact that you, the complainant, had to alert me of the FCA's error rather than the FCA itself.
22. I am concerned that the FCA wrote to me to say it had apologised to you about this mistake, but in fact it had not done so and the fact that you, the complainant, had to alert me of the FCA's error in claiming this, rather than the FCA itself, and I express strong criticism of this.
23. I am concerned that the FCA has now said that it will apologise to you but has not apologised to me for making yet another mistake in not providing correct information to me. The FCA cannot claim that there were gaps in processes for not realising it had not apologised to you for this mistake. This is yet another example of what I consider maladministration in this complaint case processing, and I express strong criticism of this.

24. These mistakes, as well as the FCA's attempt to deflect this complaint, is yet another example of the unattractive behaviours, poor judgement and maladministration which the FCA has displayed throughout the history of this complaint, and which fall below the standards I would expect of the regulator. It doesn't help matters that the FCA badly delayed its response to my preliminary report.
25. The FCA is right to say that it 'is imperative for your office to be able to rely on the information we provide in order to reach well-reasoned and fair decisions, and to maintain the integrity of the Scheme overall'. I do not consider that the FCA fulfilled my expectation in this regard in this particular case.
26. In recognition of the continuing distress and inconvenience the FCA has put you through, given the compendium of complaints on this matter generally, and particularly in its decision first not to investigate your complaint, and second in its delay in responding to my preliminary report, I recommend the FCA offer you an ex gratia payment of £500.

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Complaints Commissioner
21 December 2023

Annex

Extract from the FCA letter to the Commissioner dated 113 December 2023

In July 2023, following correspondence about email diverts to the FCA (from Mr X and other individuals), the FCA undertook a further review. The review concluded that there was, and continues to be, a lawful basis for the FCA to put email redirections in place, but also identified issues with how the email divert in Mr X's specific case was implemented. Our letter to Mr X of September 2023 stated that: "...the FCA's application of email redirections to you were likely not compliant with the GDPR." The findings were specific to the circumstances of the email redirection in Mr X's case, and did not relate to the lawful basis or the FCA's general right to put email redirections in place.

Whilst we acknowledge that the application of the email divert in this specific case has been found to likely be a breach of GDPR, we do not agree that we "deliberately misled" you or Mr X in dealing with his complaints. Mr X was provided with information that we believed to be correct at the time. To explain, during the review initiated in July 2023, we identified a data breach log from February 2020 that recorded the diversion of Mr X's emails intended for the Y team as a possible data breach. However, the Complaints Department was not aware of the data breach log from 2020 until the 2023 review, and consequently this information was not shared with either Mr X or your office when dealing with the earlier complaints. We accept there was a process failure in this regard, and would note that in mid-2020 we transitioned our system for logging and tracking data breaches onto a new platform where the search functionality was significantly improved.

I feel it is important to emphasise that making an honest mistake is entirely different to deliberately misleading, and whilst I recognise this is a decision for you to make, I have not seen anything that leads me to believe we deliberately misled you or Mr X in this case. The Complaints Department was not aware until the DPO's wider review of email diverts in 2023 that the way in which the divert was implemented for Mr X had likely resulted in a GDPR breach. We have apologised to Mr X for this mistake, and I

would also like to apologise to your office that we did not provide the correct information due to the gaps in our process around the historic data breach logs. I fully understand that it is imperative for your office to be able to rely on the information we provide in order to reach well-reasoned and fair decisions, and to maintain the integrity of The Scheme overall.

We would highlight again that when we realised that this mistake had been made, which was specific to Mr X's circumstances, we contacted Mr X to inform him of the correct position and to apologise. We additionally note that in our public communications we have acknowledged that we made a mistake in the case of this redirection, making reference to it in question 84 of our Annual Public Meeting of 2023.