

16-2-2017

Dear Complainant,

Complaint against the Financial Conduct Authority
Reference Number: FCA00235

Thank you for your email of 1 October 2016. I have now reviewed the information sent to me by you and the Financial Conduct Authority (FCA), and am able to write to you.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA's Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment.

What we have done since receiving your complaint

I have reviewed all the papers you and the regulator have sent to my office and I have also asked additional questions of the FCA and considered their response. Both you and the FCA have had the opportunity to comment in response to my preliminary decision. My decision on your complaint is explained below.

Your complaint

On 5 March 2016 you complained to the FCA that its decision to release to HMRC confidential information about your firm ("the firm") was made unreasonably and in breach of the principles of natural justice. You said that in your view the FCA should have asked the firm for its views on the appropriateness of disclosing this information and that these views should have been considered by the FCA as part of its decision-making process before agreeing to the HMRC request.

The FCA considered your complaint as an allegation of 'lack of care' by the FCA and investigated it under the Complaints Scheme ("the Scheme"). On 1 August 2016 the FCA wrote to inform you that your complaint had not been upheld. This was on the basis that the FCA had the legal right to disclose the information, was not obliged to seek the firm's opinion on the disclosure, and had not acted unreasonably by not approaching you.

You are dissatisfied with this response and have asked me to investigate. You do not dispute that the FCA had the right to disclose the information but you believe that the FCA should have considered the firm's position before agreeing to release the information, which was confidential, and allowing HMRC to use it in legal proceedings. You are dissatisfied that the FCA did not consult with the firm before providing the information to HMRC and agreeing to its use in legal proceedings, nor did it let the firm know after the event that it had done this.

You have informed me that HMRC was the **defendant** in an appeal that the firm was making against a tax assessment and that the confidential information had not been used in any way by HMRC when issuing/justifying the assessment or when responding to internal appeals prior to the appeal to the First-Tier Tribunal (since it was totally irrelevant to the point at issue). You believe that in these circumstances the FCA should have given the firm an opportunity to explain why the information should not be released. Instead, you believe what happened is that HMRC first asked for a copy of the information, and then for permission to use it in proceedings, and that the FCA, having satisfied itself that it was acting within its powers by agreeing to this, simply said yes without giving appropriate consideration as to whether it was reasonable to do this. The FCA response to your complaint seems to indicate that they simply checked that it was lawful to agree to the HMRC request but did not consider whether it was reasonable to do so. You believe that this was unreasonable bearing in mind that the information in question was confidential and that therefore the FCA had an implied, if not explicit, duty of care to the firm when considering whether to agree to the HMRC request.

Furthermore, you have said that although we cannot know what decision the FCA would have come to if they had considered whether it was reasonable to agree to the HMRC request, the fact that the FCA does not appear to have done this was, in your view, highly and unreasonably prejudicial to the firm. The Judge at the Tribunal fully accepted the firm's submission that the confidential information was irrelevant to the point at issue and it had no bearing on his decision (which was in the firm's favour). However, the firm has suffered permanent reputational damage in that the information (even though confidential) is referred to in the decision, which is a public document.

You have tried on several occasions to find out from the FCA whether any consideration was given to the position of the firm before agreeing to release the information but have never had a response to indicate that any such consideration was given. You would like me to determine whether the FCA has acted unreasonably and inappropriately in this matter by giving no, or insufficient, attention to the firm's position before agreeing to release the information to HMRC and allowing them to use it in legal proceedings.

My position

My approach to your complaint has been to review the investigation conducted by the FCA under the Scheme and to consider the reasonableness of its response to you. I have also asked the FCA additional questions to clarify the circumstances under which the decision to release the confidential information was made, the considerations that were taken into account, and details of the external and internal policy documents and guidance that were relied upon.

General Considerations

As you know, under the Financial Services and Markets Act 2000 (FSMA) confidentiality restrictions generally apply to information obtained by the FCA in carrying out its regulatory functions. Section 348(1) prevents the FCA from disclosing confidential information unless a legal gateway applies. Without a gateway, the FCA may not release confidential information without the consent of the person who provided it with the information, and the person about whom the information relates, if a different person. However, there are a number of circumstances in which regulatory information may be disclosed lawfully.

Subject to one qualification, the FCA's view is that the use of a gateway is discretionary and that the language used in the Disclosure Regulations supports this. For example, Regulation 12(1) says that a "primary recipient" "**is permitted to disclose such information**" to a relevant recipient (emphasis added). Language such as "must" or "shall" disclose is not used. The qualification is that, where a gateway is available, and where the potential recipient has access to compulsory powers which compel a third party to provide information, the FCA would not be able to rely on s348 FSMA to refuse to provide the information. This seems to me to be a reasonable interpretation of the regulations and statutory framework.

Furthermore, the FCA considers that Part 23 FSMA does not impose a duty to consult the subject of the information where use of a gateway is being considered. This is reflected in its internal and external guidance, the focus of which is on establishing that a gateway under the FSMA confidentiality regime is available (as you accept was so in your case). I have seen internal guidance which sets out various factors which could be taken into account when deciding whether or not to consult the subject of the information intended for disclosure. I am not able to disclose this guidance to you as the FCA considers that it is subject to legal privilege and therefore confidential, which I accept. However, I am satisfied that the FCA has applied this guidance in your case. I explain more about this in the next section, below.

Having said this, I consider it would have been more helpful if the FCA's response to your complaint had explained more clearly to you the considerations and guidance the FCA applied in exercising its discretion in your case, rather than focussing on the legal framework.

Specific Considerations in your case

In November 2015, HMRC made a formal request to the FCA for confidential information relating to the firm. On 21 December the information requested was passed to HMRC on an 'intelligence only' basis under the relevant legal gateway. The FCA says that it would not be necessary under its guidance to inform or consult the firm at that stage. It says that a key consideration for adopting this approach is the quality of its relationship with the requester. HMRC falls into the category of a UK-based public body with which the FCA has regular dealings and with which it has entered into a Memorandum of Understanding to cover data exchanges to assist the carrying out of its public functions. I do not find this to be an unreasonable approach in principle.

On 22 December 2015 HMRC sought the FCA's further permission to bring the confidential information to the Tribunal as evidence because it was of 'direct relevance' to the proceedings. The FCA sought internal advice from its legal team (GCD). This included asking whether the firm's agreement should be sought. The FCA considers this advice to be subject to legal privilege but has agreed to waive that privilege in order for me to inform you that GCD advised that this further disclosure was permitted under the Disclosure Regulations and that the FCA could rely on HMRC's assurance of relevance. The FCA's view is that this decision was not unreasonable, taking into account that the confidential information was to be used by HMRC in a hearing before an independent Tribunal at which the firm would be able to make (and did make) representations on such matters as whether the Tribunal should consider the confidential information at all and, if it did so, the weight that should be placed on it. It says that these were not matters on which the FCA could form a view.

Having considered the FCA's confidential internal guidance, I am satisfied that this was a reasonable approach to take. The FCA considers this guidance to be subject to legal privilege

but has agreed to waive that privilege in order for me to say that the guidance refers to a 'fairness' test and a relevant consideration in relation to this is whether the requester will be obliged to provide the person concerned with an opportunity to make representations should it decide to rely on the disclosed information. In your case, HMRC had to ask the firm for permission to add the confidential information to the bundle and when this was refused had to approach the Tribunal for permission. I consider that these matters were properly within the Tribunal's jurisdiction.

Although I am sympathetic to your point that the fact of the existence of the confidential information is now a matter of public record, I consider that this matter is (and has been) properly addressed through the Tribunal proceedings rather than arising from the FCA's decision to release the information to HMRC. I am satisfied that the FCA gave proper consideration to HMRC's request and applied its discretion in deciding not to inform you of the request in accordance with its internal and external policies and guidance.

For these reasons, I am unable to uphold your complaint.

On a procedural point, I note that there is an error in the FCA's complaint response dated 1 August 2016, in that it states that the firm "has been subject to legal proceedings brought against it by HMRC in relation to tax issues". You have told me that the correct position is that the firm initiated the proceedings to challenge a tax assessment. On receipt of the FCA's response you pointed out this error.

The FCA considers that this error does not make a material difference to the outcome of its investigation into your complaint. However, the statement was made as the background to your complaint and therefore had the clear implication that it was the basis on which your complaint had been considered. In my preliminary decision I recommended that the FCA issued you with a corrected response letter to address this error. I understand that it has now done this.

Conclusion

In conclusion, for the reasons set out above, I do not uphold your substantive complaint. However, I consider it would have been more helpful if the FCA's response to your complaint had explained more clearly to you the considerations and guidance the FCA applied in exercising its discretion in your case, rather than focussing on the legal framework.

I am pleased that the FCA has now issued you with a corrected response letter to address the error identified above. I am unable to help you further under the Scheme but I thank you for bringing these matters to my attention.

Yours sincerely



Antony Townsend
Complaints Commissioner