

16 July 2020

Final report by the Complaints Commissioner

Complaint number FCA00741

The complaint

1. You complained to me on 16 May 2020 about the Financial Conduct Authority's (FCA) decision not to uphold a complaint which you had made.

What the complaint is about

2. In its decision letter on your complaint, the FCA described it as follows:

Your complaint is that you and your two children appeared in an FCA video about vulnerability. You believe the video implied that you and your children were vulnerable. You say you did not provide the FCA with permission to use images of you or your children in the video. Since alerting the FCA, it has edited the video to remove the images of you and your children. You are satisfied with this, but would like compensation of £1000 for every year that the video has been available.

What the regulator decided

3. The FCA did not uphold your complaint. It said:

I am satisfied that the FCA was quick to edit the video you complained about, removing the images of you and your children. The FCA also provided you with an apology for any distress caused as soon as you raised your concerns. This was done as a gesture of goodwill in understanding of the inconvenience caused to you, not as admission that the inclusion of these images was wrong. I have not found that you and your family suffered any harm or loss that would require a payment to put right.

Given my findings, I am not upholding your complaint. I believe that the FCA acted appropriately in the circumstances and I feel compensation is not warranted in this case.

Why you are unhappy with the regulator's decision

4. In your complaint to me, you say:

I am extremely unhappy about this decision and... feel that the FCA did not investigate my complaint fully or understand the gravity and the effect it has had on me and my children, They then failed to remove data when they said they had done so and then made an excuse as to why it had not been done.

Preliminary points

5. It is important that I explain what I can and cannot consider under this Scheme. Most importantly, I cannot 'rule' on complaints about compliance with data protection law. So, if you think that the FCA may have acted against data protection law, you would need to pursue that with the Information Commissioner's Office and/or take legal advice. (You have indicated to me that you intend to do this.)
6. What I can, however, do is say whether or not I think that the FCA has acted reasonably.

My analysis

A Chronology

7. The sequence of events is important here, so I shall set them out in some detail.
8. As the FCA described (see paragraph 2), in February 2015 it published a paper about vulnerable consumers which included video footage, shot in a shopping centre, of you and your children. You were unaware that the filming was taking place.
9. On 23 October 2019, friends of yours told you that they had seen you and your children in an FCA video about vulnerable consumers.
10. On 24 October 2019, you telephoned the FCA to complain about the video. You asked for it to be taken down, and for compensation of £1,000 for each year the video had been shown.

11. On 25 October 2019, the FCA took the video down from the site where you had viewed it. They subsequently produced a new version of the video, without the footage of your family, which they showed to you. Meanwhile, your complaint and request for compensation were referred to the Complaints Team.
12. On 15 January 2020 you were told that your complaint had been allocated to an investigator, who began work. However, that investigator then left the FCA, and a new investigator got to work in March 2020. On 9 March you received a letter confirming that your complaint was being investigated under this Scheme.
13. There was then extensive work undertaken between various departments in the FCA, and on 24 April 2020 the FCA sent you its decision (see paragraphs 2 and 3 above).
14. The following day you responded. You made the following points:
 - a. You had just done a Google search, and had discovered very quickly that the *unedited* version of the video was still accessible, despite what the FCA had told you;
 - b. You drew attention to the fact that the FCA investigator said that she had been unable to view the unedited version of the video;
 - c. You said that the FCA's Data Protection Officer had reached a view on your complaint without seeing the unedited version of the video, and he should now look at it;
 - d. You said that the FCA's descriptions of the unedited video – "you and your children walking in the background during filming", "you and your children briefly walked past during filming and your image therefore appeared in the background....." were simply wrong, and you asked, *How can you make those statements when you say yourself you did not watch the video? Who gave you this information and on whose authority?*;
 - e. Finally, you said:

You [the FCA] say "it was not the FCA's intention deliberately to capture you and your children as part of the film." It clearly was the FCA's intention to capture us on film as we are in the foreground and

followed as we walk towards the camera for ten seconds. Also – how would you know that if you had not seen the video?

15. The main part of the FCA's response to your comments was:

Having carefully considered your comments, I'm afraid my view of your complaint remains largely unchanged.

I can appreciate your frustration at being able to locate the video online after I had confirmed this had been removed. However, unbeknownst to the Editorial & Digital Team and me, a link to the video was also contained within the transcript. They explained that it was unusual for such a link to be incorporated within a transcript and therefore they didn't check this document for its removal. Please accept my sincerest apologies for this error on behalf of the FCA.

I am sorry for how this situation has affected you, but I am satisfied it has now been appropriately resolved.

B. My views

16. The chronology above shows that the investigation of your complaint was delayed. As I have reported in other complaints, the Complaints Team currently has a major backlog of complaints, as a result of which there are long delays. The result of this was that your complaint, lodged in October 2019, was not investigated until March 2020. The FCA has already apologised to you for this, and you have accepted a payment. I will not therefore comment further on the delay.
17. I have carefully reviewed the internal FCA papers. It is clear that, when the FCA first received your complaint, it acted quickly. It took down the video the following working day (although – as subsequently became clear – it missed another published link), apologised to you, and it then produced a new version omitting the footage of you and your family. The FCA's initial intentions and actions were, in my view, good.
18. The problems arose in the FCA's approach to the subsequent handling of your complaint. As I explained in paragraph 5 above, this Scheme does not resolve legal disputes; however, the FCA's initial focus seems to have been on whether

or not what it had done was legal. Having apparently established that, in its view, the footage did not constitute ‘personal data’ for the purposes of data protection legislation (and was therefore not contrary to the law) I do not think that the FCA focussed clearly enough on whether or not its actions had been reasonable.

19. The FCA’s decision letter essentially gave two reasons for not upholding your complaint. The first was the promptness with which the FCA had responded when you first approached it: I agree with that part of the FCA’s assessment.
20. However, the second reason advanced by the FCA is more problematic. What the FCA said was:

I understand that what happened was that you and your children briefly walked past during filming and your images therefore appeared in the background, but that it was not the FCA’s intention deliberately to capture you and your children as part of the film..... The FCA also provided you with an apology for any distress caused as soon as you raised your concerns. This was done as a gesture of goodwill in understanding of the inconvenience caused to you, not as admission that the inclusion of these images was wrong. I have not found that you and your family suffered any harm or loss that would require a payment to put right.

21. The problem with this statement is that it simply is not true. I have watched the video footage. Contrary to the impression given by the FCA’s description – ‘walked past’, ‘in the background’ – the camera clearly focusses upon you and your family for around ten seconds. The fact that the FCA’s intentions when filming may have been benign is beside the point: you and your family were chosen to be the focus of a shot in a video on vulnerable consumers.
22. In my view, it is clear that the FCA’s complaint decision was at least in part based upon a false premise. There is a big difference between a shot in which people appear incidentally in the background, and a shot in which those people are *the chosen focus of the camera*.
23. This brings me to your response to the FCA’s decision letter, quoted in paragraph 14 above. In essence, your response said two things:
 - a. The FCA had failed to remove the unedited video from all publicly accessible websites;

- b. The FCA's justification for its decision, based upon the notion that you and your family were incidental figures in the background of the video, was wrong.
24. You were right on both counts.
25. In the light of that, I find it extraordinary that, in its reply to you, the FCA – while acknowledging and apologising for the fact that the unedited version of the video had inadvertently been left on one part of its website for a further six months until you raised the alert – said that *I'm afraid my view of your complaint remains largely unchanged*. It seems to me that, at the very least, the FCA should have undertaken a reassessment.
- My decision*
26. My conclusions are as follows:
- a. The FCA's immediate response to your initial complaint was prompt and appropriate;
 - b. The FCA inadvertently left one link to the unedited video on its website – this was unfortunate, but the FCA has apologised and remedied the matter;
 - c. The FCA's decision letter gave a misleading impression of the video footage;
 - d. When you drew attention to the error, the FCA said that its view of your complaint was 'largely unchanged' - *in my view, this position was not defensible*.
27. On the basis of those conclusions, my view is that the foundation of the FCA's decision was flawed. As a matter of good practice, I think that it was at least questionable whether the FCA should have included a clip focussed on you and your family (including two young children) without your permission.
28. In response to my preliminary report, the FCA (after another delay) has accepted that the video footage was not 'correctly portrayed' in the original decision letter, and that when you responded to the decision letter, it should have taken the opportunity to address the 'misinterpretation' of the footage.
29. In your response to my preliminary report, you said:

I think the FCA has not considered the impact this has had on me for over eight months now and the emotional stress this continues to cause me as I think about the video and the implications of the footage shot of me and my children without permission.

I still do not feel satisfied with the FCA's decision over my depiction as "vulnerable" and do not think they have addressed this. I am a very private person and this footage has not only violated that privacy but made me and my children look vulnerable. This makes me feel ashamed and I don't think the FCA has taken my feelings into consideration at all.

I think £500 [my preliminary recommendation] is not enough compensation.

I think the FCA should have explained to me what their procedures are for using footage of the general public in their video programmes. I assume they have a policy about this and if so I should have been made aware of it. They then should have explained to me how they would ensure that this does not happen again to someone else. And perhaps that some one else may be not wanting them or their children to be filmed due to escaping domestic violence for example. So they need to acknowledge that they must be careful about using the general public and more importantly, children within their videos.

30. I have sympathy with all these points.

31. I **uphold** your complaint. My **recommendations** are:

- a. The FCA should apologise to you for using the footage without your permission;
- b. The FCA should apologise to you for giving a misleading impression of that footage in its decision letter;
- c. The FCA should apologise to you for having failed to reconsider your complaint when you drew the failings to its attention;
- d. The FCA should offer you an ex gratia payment of £750 in recognition of the distress and inconvenience which its actions have caused (in addition to the £75 which I believe you have already received);
- e. The FCA should write to you with more information about its policy on the use of videos.

32. I have recommended a sum of £750 (which is higher than most awards under this Scheme) because I consider the FCA's failings were significant, and in the light of the points you made in response to my preliminary report. I do not, however, consider that the sum which you have claimed - £1,000 per year – would be justified under this particular Scheme.
33. I am pleased to say that the FCA has accepted all my recommendations.

Antony Townsend
Complaints Commissioner
16 July 2020