

12 May 2021

**Final report by the Complaints Commissioner****Complaint number FCA00756***The complaint*

1. On 1 January 2021 you asked me to investigate your complaint against the FCA.

*What the complaint is about*

2. You raised a number of issues with the FCA. A brief summary of these from the FCA decision letter is as follows:

## Part One

An automatic email rule (the 'divert') was applied to any emails you sent to the FCA (i.e. to any '@fca.org.uk' email address). You feel the application of such a rule was inappropriate, unfair, and disproportionate.

## Part Two

The FCA's application of the divert without notifying you of this process, explaining the reasons, or giving you an opportunity to appeal or respond was procedurally unfair. The application of the divert meant individuals, other than the intended recipient, were able to review your emails. You believe this is likely to contravene GDPR.

## Part Three

Internal FCA correspondence regarding the implementation of the rule was not revealed to you as part of your subject access request.

## Part Four

Your correspondence in relation to an Independent Inquiry was mishandled as the FCA would have seen you were trying to contact it as early as September 2019 and was effectively blocking your attempts. If it was an

error to apply the divert to emails intended for the Independent Inquiry then this should have been picked up by the HR recipient – Manager D – when this first occurred.

#### Part Five

You are unhappy with the length of time it is taking for the Complaints Team to investigate and respond to your complaint.

#### *What the regulator decided*

3. The FCA upheld Parts Four and Five of your complaint. It said it had initially investigated the allegations in Part One and Part Two before reaching the conclusion that they were excluded from the scope of the Complaints Scheme. It considered Part Three, and some of Part Two, of your complaint fell outside the scope of the Complaints Scheme but said these were nevertheless being considered by the FCA's Information Disclosure Team who would write to you shortly.

#### *Why you are unhappy with the regulator's decision*

4. You have written a detailed 10-page letter to me setting out why you disagree with the FCA's decision. I can summarise your main points as follows:
5. Element One: You disagree that Part One and Part Two of your complaint should be excluded from the Scheme for the following reasons:
  - a. You raising concerns about an employment matter did not necessitate or mandate the FCA to apply, intercept and divert all future emails to any FCA address. You feel that a blanket divert on all your emails to the FCA would impact your connection with the FCA public process: This may include for example: 'submissions to public enquiries, responses to public consultations on regulatory changes, correspondence via the FCA's Consumer Queries channel, correspondence via the FCA's Firm Queries channel, matters I may need to raise through the FCA's Whistleblowing channel, Complaints, Information Access and Freedom of Information Requests'.
  - b. Further, you say that absent any formal policies, processes and governance,

there is a significant risk that individuals at the FCA use intercept and divert as a means of shutting down legitimate challenge or opinions they don't like. The risk of it being applied in an inconsistent and discriminatory way is significant due to the following:

i. That the FCA has no documented policies, processes, or internal guidance on when intercept and divert can be used and the steps and governance that should be followed when it decides to apply it;

ii. That in my case, the FCA holds no documented records that explain why intercept and divert was applied and there are no records of its use being authorised;

iii. Similarly, in my case, there were no written instructions to internal FCA participants in the intercept and divert process on what should or shouldn't be intercepted and how correspondence that was not employee related should be handled;

iv. That the FCA maintains no central records of its use, intercept and divert, such that it has no way of knowing how many people it has been applied to;

v. The FCA has no process for informing individuals that intercept and divert has been applied to them, has no process for monitoring its application of intercept and divert to ensure it is being applied in a fair and consistent way, has no process for periodically reviewing its intercept and divert population to ensure that it remains appropriate, and has no process that allows individuals to appeal the application of intercept.

6. Element Two: You believe the investigation into your complaint was delayed.

7. As remedy, you would like:

a. An unequivocal acknowledgement from the FCA that its application of intercept and divert to you was inappropriate, and unequivocal apology, and the immediate lifting of the intercept and divert rule;

b. An opportunity for you to meet with the FCA Audit Committee and Chair to discuss your concerns about its processes and governance;

- c. An ex gratia payment of £20,000 may be appropriate due to the FCA's alleged bad faith and misconduct in this matter.

### *Preliminary points*

8. Before considering the merits of your complaint, I need to set out the limits of the Complaints Scheme. You can find further details at <http://frccommissioner.org.uk/complaints-scheme/>, but the key points are these:
9. The FCA's relationship with its employees is excluded from the Scheme (see paragraph 3.4 of the Scheme).
10. This Complaints Scheme cannot make legal findings. I cannot, therefore, "rule" on whether the FCA's practices are lawful, or whether the FCA has acted in bad faith- this is a matter only the courts can deal with. I have addressed your complaint within that constraint.
11. You have alleged irregularities connected with your whistleblowing, but this is not a matter which the FCA has reviewed under the Complaints Scheme. I suggest you refer your complaint to the FCA in the first instance so it can conduct its own investigation first.
12. You have referred to GDPR and Regulation of Investigatory Powers Act 2000 (RIPA) concerns, but these are not matters within my remit.

### *My analysis*

#### Element One

13. The background to your complaint is that you are an ex-employee of the FCA and you continued to correspond with the FCA after you left the organisation on employment related matters. However, you also contacted the FCA on other matters. At some point you contacted Independent Inquiry Team Y at email address [xxxx@fca.org.uk](mailto:xxxx@fca.org.uk) . During your correspondence with the Independent Inquiry Team Y you came to realise that all your emails were being diverted to an individual (D) in the FCA Human Resources (HR) Department. When you first found out, inadvertently, about the divert, you queried this with the FCA. A member of the FCA staff wrote to you and said that you had been advised previously that a divert would be placed on emails from you to the FCA and why. You disputed you had ever been told this. The manager of that team wrote to

you confirming they had looked into the concern you had raised, and arranged for the divert to be immediately amended so it would not apply to any emails you sent to the Independent Inquiry teams or the internal Independent Review teams. They also established that it had only been 2 emails you had sent that had been impacted. In response to your request for further clarification of how the FCA was approaching the divert of your emails, they suggested you contact individual D in HR if you had any further questions given the nature of your query

14. With regards to your specific case, the FCA Complaints Team has said that it could not find any documented rationale as to why the divert was placed on your emails; that the Independent Inquiry Team Y was not aware of the diverts being placed on your email; that Manager D within HR did not forward your emails contemporaneously to the areas they were intended for; and that the decision not to inform you of the application of the rule was also an employer/employee related matter and, therefore, is excluded from consideration under the Complaints Scheme.
15. With regard to email diversion in general, it appears there is no internal policy or monitoring mechanism within the FCA with respect to diverting emails from members of the public. The FCA has said that as a result of its own investigation into your complaint, it had already decided that it should improve the approach to monitoring and recording such diverts, and this is already being implemented.
16. The FCA Complaints Team engaged in discussion with the CEO's office and its HR department to try and piece together why this divert may have been applied to your emails. It concluded that it understood the divert was placed because of correspondence that was being sent by you to various people at the FCA connected to your previous employment. The FCA explained, 'This was why the correspondence was to be collated and redirected to Manager D, who was the HR manager with responsibility for Employee Relations'.
17. I start by considering the jurisdictional points. It is clear that your matters related to your previous employment fall outside the Complaints Scheme, but that is not what your complaint is about. Your complaint is about the FCA acting unprofessionally. The FCA has cited the exclusion of the FCA's relationship with

its employees as a reason for excluding your complaint, but I do not accept that. That exclusion provision is designed to deal with employment issues, which are unsuited to this Scheme. In the first instance, I considered your complaint is about the appropriateness of staff actions (in diverting your emails, even ones that do not refer to employment issues), rather than with employment issues directly. It is my view you were alleging the FCA had acted unprofessionally.

18. With this in mind, my initial thoughts were that this complaint element should not be excluded under the Complaints Scheme, and I gave an opportunity to both the FCA and you to comment on this point. You agreed that the complaint should not be excluded, however, the FCA made representations to me that even if the matter were not an employment issue, the question of whether the FCA had acted professionally in applying the divert would only fall under the Complaints Scheme if it was connected to the FCA's exercise of its 'relevant functions'<sup>1</sup> and the FCA did not think that there was any 'relevant function' being exercised in connection with the decision to apply the divert because it was in connection with employment matters, and as there was no exercise of relevant functions at the time of the divert, those allegations were out of scope.
19. I considered this point carefully, and in doing so I relied on advice I had by then received from counsel (privilege in which is not waived). For the avoidance of any doubt, this advice was not connected to your complaint in any way. I am mindful there is a category of complaint that may be made to the FCA but which sits wholly outside the Scheme because it does not arise in connection with the exercise of 'relevant functions. I am persuaded, on further consideration, that, if the diversion of emails was not connected to the FCA's exercise of 'relevant functions', the complaint about it would be excluded.
20. It was not immediately clear to me whether that was indeed the case with your complaint as matters were complicated by the fact that the FCA had upheld Part

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<sup>1</sup> The relevant functions of the FCA for the purposes of s. 84(1) are "its functions conferred by or under [the Financial Services and Markets Act 2000 ["FSMA"], other than its legislative functions and its standards review functions" and "such other functions as the Treasury may by order provide" (s. 85(2), subject to immaterial exceptions in s. 85(8)). The Treasury has added to the list of relevant functions of the FCA in art. 3 of the Financial Services Act 2012 (Relevant Functions in relation to Complaints Scheme) Order (SI 2014/1195)

Four of your complaint on the basis that it is '*within the scope of the Scheme to review the impact of the divert upon emails intended for the Independent Inquiry Team Y, since the support provided to the Independent Team is something that is connected to an exercise of our relevant functions.*' It is relevant here that the FCA, in its decision letter to you, had specified that the Independent Inquiry Team Y's email ended @fca.org.uk.

21. I considered that if the divert on your emails was not connected to the FCA's exercise of 'relevant functions', it should be excluded, but I also took it, based on paragraph 20 above, that the FCA deemed some of your emails to be to areas within the FCA where support is provided connected to relevant functions, such as those to the Independent Inquiry Team Y, and it therefore agreed a diversion should not have been in place and upheld your complaint. I raised this point initially by inviting the FCA to explain how it plans to deal with emails from you in future which may be non employment related and intended for other areas within the FCA, as given the experience you have had in your correspondence with the Inquiry Team, there is no reason to conclude this won't happen again with another FCA team. The FCA did not address this point in a satisfactory way, although it did point out that matters related to the diversion had not been investigated as they were excluded.
22. I then wrote to both you and the FCA again in order to obtain your respective views, and I addressed the matter raised above by inviting the FCA to comment on the divert, which, regardless of whether it is excluded under the Complaints Scheme, may lead to so called 'unintended consequences', or actions which are upholdable complaints under the Complaints Scheme. You agreed that the FCA's policy 'delivers inappropriate outcomes.
23. In my further engagement with the FCA on this matter, and only as a result of my repeated requests for clarification, some information has now been clarified by the FCA and the overall position is as follows:
24. The FCA has pointed out that how it treats your emails generally is not a matter which falls under the Complaints Scheme; it is a matter subject to its discretion and it owes you no explanation, and in any event your emails reach their intended recipients if they are not related to employment matters. It is also the

case that since the FCA issued its decision letter on your complaint, the divert on your email has been lifted on some, but not all areas of the FCA and that in addition the FCA recognises that you can, and do use alternative email addresses on which it has not placed a divert.

25. Inquiry Team Y is an external team to the FCA. Although it ended up sharing the FCA domain ending for its email address, in essence it is a separate, non FCA team, and as such the FCA's discretion does not apply to it. The FCA has said it was a mistake to divert emails to external teams and has conducted internal reviews to make sure this type of what I gather is a rare event is addressed in future.

26. The FCA also said that:

'We understand [the Commissioner's] position to be that Parts One and Two would be in scope if you look not at the appropriateness of the divert decision, but more broadly whether there is a risk that any correspondence relating to relevant functions could be (negatively) impacted. We agree that if there was an inappropriate impact on correspondence relating to relevant functions, that could be considered under the Scheme. We are not aware of any such impact though..... In general, we would not agree that the mere act of forwarding an email internally that is connected with relevant functions would be inappropriate'.

27. Finally, the FCA reiterates the point that it has not reviewed Parts One and Two of your complaint because it decided that the divert related to employment matters. This decision was not based on whether the emails received related to relevant functions, and it says it made no observations in that regard.

28. Both you and the FCA have pointed out that the FCA's Information Disclosure Team (IDT) has reviewed your concern about the email divert and provided you with a response. You have separately told me that the FCA considers that it is appropriate for the divert to remain in place and provided me with this response. The FCA has given you rights of referral to the Information Commissioner's office about this decision.

29. As a result of my further enquiries of the FCA, it has now confirmed that the FCA's IDT response that the divert is appropriate is based on considerations related to GDPR and the Data Protection Act only, and what it really means is that the divert does not breach GDPR rules, rather than that the divert is appropriate in *all* (my emphasis) circumstances.
30. These are matters which could and should have been clarified by the FCA much earlier in the process as they are relevant to the case.
31. You have told me you do not think the FCA's diversion of your emails 'represents a fair and legitimate policy', and you have asked me to determine whether, even if so, in your case 'the decision to invoke that policy was reasonable and appropriate'.
32. Given all the above, my preliminary view is as follows:
33. The appropriateness of the FCA diverting your emails would only be a matter for the Complaints Scheme if it caused an inappropriate impact on correspondence relating to the FCA's exercise of relevant functions. If it did not, although I appreciate it may be a source of great frustration to you, your complaint is of a category of complaint that may be made to the FCA but which sits wholly outside the Scheme because it does not arise in connection with the exercise of 'relevant functions' and I would not be able to review it.
34. Therefore, I would not be able to review your complaint as you have presented it: that 'the application of such a rule was inappropriate, unfair, and disproportionate'. It is possible that a differently formulated complaint, might be investigated under the Scheme, but that is not how your complaint was presented.
35. An additional factor here is that the FCA has not reviewed your complaint under Part One and Two with respect to whether the emails you complained about related to its relevant functions, and it says it made no observations in that regard.
36. You may, if you wish, submit a complaint on a revised basis to the FCA for a new investigation if you feel a diversion of any of your emails has had an inappropriate impact on correspondence relating to the FCA's exercise of relevant functions. The Complaints Scheme says that usually the FCA will be

allowed to do its own investigation into a complaint first, and I think this is an appropriate course of action open to you if you decide to do so. You have already referred the matter of the diverted emails to the external Independent Inquiry Team Y and this complaint has been upheld. I agree with the FCA's decision to uphold this element of your complaint and to offer you an ex gratia payment for your distress and inconvenience.

37. Whilst the FCA has not investigated Part One and Two of your complaint, it has provided the following comments:

38. With respect to your points in 5 b (i-v). The FCA has said that it has not investigated these points under the Scheme, so 'it is not possible to be definitive on what is agreed or disputed' but has commented as far as it can. I summarise the main points as follows.

- a. The FCA wishes to emphasise an important legal distinction, in that it does not accept in relation to the matters summarised in paragraph 5, or at all, that the FCA has "intercepted" any emails from you, as it has the right to own and control its own telecommunications systems. The FCA says no criminal or unlawful behaviour under RIPA has therefore occurred;
- b. The FCA denies that there is an 'blanket divert' on your emails; you have told me that you do not agree this point, however, from the evidence available to me I can see that there are some areas within the FCA where you can now correspond directly and there is no divert in place.
- c. Whilst there is no documented rationale why the divert was placed, there is clear contemporaneous correspondence that evidences the authorisation of the divert; you have asked who ultimately authorised this divert, but that is not a matter either the FCA or I have considered under the Scheme.
- d. The FCA does not agree it needed to have informed you of the diversion, as it does 'not consider it necessary to inform individuals how we choose to deal with their correspondence internally within the FCA, and/or to give them an opportunity to appeal our resourcing decisions'. The FCA says it clearly has a discretion as to how it handles the correspondence it receives, and 'there is nothing wrong, in our view, in determining that particular

correspondence should be referred to a central mailbox (in this case to a named individual) before being actioned’;

- e. The FCA agrees that maintaining better records, and a central log, around the application of a divert like this would be desirable and is currently reviewing how to implement this across the FCA;
- f. The FCA does not, however, consider that it has engaged in inappropriate conduct or bad faith with respect to these matters.

39. As the matters above have not been the subject of an investigation, either by the FCA or by me, I make no finding on your points in 5a, and 5b(i-v).

40. You have asked that the FCA invites you to a meeting with the FCA Audit Committee and Chair to discuss your concerns about its processes and governance. Neither the FCA nor I know the specific nature of your concerns. I hope that the FCA reviews your concerns, but I do not think it is appropriate for me to recommend a specific format for how these concerns are relayed, whether that be in person or in writing.

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.

#### Element Two

42. You are concerned with the delay in the investigation of your complaint. I am afraid that your case is far from the only delayed FCA complaint case. My predecessor drew attention to the FCA’s delays in his published annual report, laid before Parliament in July 2020. I have been given details of the steps the FCA are taking – principally a significant increase in the number of investigators – to deal with the problem. I will continue to monitor the situation. The FCA has upheld your complaint, which I agree with, and offered you an ex gratia payment of £250 which I welcome.

*My decision*

43. I appreciate you feel aggrieved that some (but not all) of your emails are being diverted by the FCA to its internal HR department. You have been able to email the FCA from a separate email account, and the latter has not been diverted. So, you do not understand why the diversion such as it is remains in place and you feel it is unfair, inappropriate, and disproportionate. You would like the FCA to lift the diversion and apologise to you.
44. 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.
45. For the reasons given above, I cannot review your complaint under the Complaints Scheme the way it is presented. The appropriateness of the FCA diverting your emails would only be a matter for the Complaints Scheme if it caused an inappropriate impact on correspondence relating to the FCA's exercise of its relevant functions. I have raised the issue before about whether the FCA's diversion of some (but not all) of your emails has potential to lead to other 'unintended consequences' in relation to the FCA's exercise of relevant functions but this is not a matter which the FCA has investigated because it reviewed your complaint solely on the basis that it was connected to employment issues. It is open to you to submit a revised complaint about the FCA's exercise

of its relevant functions under the Scheme. It would be your decision whether to submit such a complaint, and I am making you aware of this option. If you decide you do have a new complaint, please refer it to the FCA in the first instance.

46. I recommended the FCA increases its ex-gratia payment to you for distress and inconvenience from £150 to £350.

47. I agree with the FCA's decision to uphold element two of your complaint and to offer you an ex gratia payment of £250.

Amerdeep Somal

Complaints Commissioner

12 May 2021