IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2012/0239
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50440806
Dated: 15 OCTOBER 2012

Appellant:	**MR JOHN WOODS**
Respondent:	**INFORMATION COMMISIONER**
Heard at:	**FIELD HOUSE**
Paper hearing:	**5 JUNE 2013**
Date of decision:	**8 JULY 2013**

Before

ROBIN CALLENDER SMITH
Judge

and

MICHAEL HAKE and GARETH JONES
Tribunal Members

Representations:

For the Appellant: Mr John Woods
For the Respondent: Mr Adam Sowerbutts, Solicitor for the Information Commissioner

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2012/0239
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Subject matter:

FOIA

Absolute exemptions
- Personal data s. 40(2)
- Prohibitions on disclosure s. 44

Qualified exemptions
- Commercial interests/trade secrets s. 43

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 15 October 2012 and dismisses the appeal.

REASONS FOR DECISION

Background

1. The Appellant requested copies of correspondence between the Financial Services Authority (FSA) and the Skipton Building Society about the raising of interest rates for some if its mortgage holders above a guaranteed maximum.

2. The FSA withheld information under sections 40(2), 43(2) and 44.

The request for information

3. On 23 November 2011, the Appellant wrote to the FSA with the following request

> On 20 Jan 2010 the Skipton Building Society raised my and other mortgage holders Standard Variable Mortgage Rate by removing a guarantee built into my mortgage that the rate would never be 3% above Bank of England base rate. This resulted in mortgage rate rising from 3.5% to 4.95%.

> In subsequent correspondence with the Skipton and its Chief Executive Mr David Cutter he claimed in a letter dated 14 March 2011 that the Skipton has "consulted with the FSA" and "the FSA was aware of this change prior to it being made and have not raised any objections on the matter".
>
> I would therefore request copies of all correspondence that passed between the FSA and the Skipton Building Society as regards the removal of the guarantee on (my) Skipton Mortgage Holders.

4. Following an internal review the FSA wrote to the Appellant on 20 February 2012. It disclosed some information but confirmed its original decision to withhold the remainder under FOIA sections 40(2), 43(2) and 44.

The complaint to the Information Commissioner

5. During the course of the IC's investigation the FSA provided copies of information that had been withheld consisting of correspondence between the Skipton Building Society and the FSA which took place prior to the society issuing its letter to some of its mortgage holders about the increase of interest rates above a guaranteed maximum.

6. The FSA argued that this information was exempt from disclosure under sections 40(2), 43 and 44. It also informed the IC that it held correspondence from the Skipton Building Society from a period after the issuing of the letter to mortgage holders. This correspondence provided the FSA with updates in relation to issues such as the numbers and types of enquiries that the society had received from mortgage holders following the issuing of the letter. The FSA argued that this information was outside the scope of the Appellant's request.

7. The FSA maintained that, as with other requests, it considered the Appellant's request in the context of the correspondence in which it was contained. That context was the Appellant's dissatisfaction with the fact that the FSA was aware of the Skipton Building Society's proposals to make changes to its guaranteed maximum mortgage interest rate but that it did not appear to have raised any objections to this.

8. The FSA believed it was appropriate for the scope of the request to be limited to the point at which the Skipton Building Society issued its letter to mortgage holders about the change to mortgage interest rates. The information the FSA held after this date was simply information provided by the Skipton Building Society about how mortgage holders were reacting to the change. That information was not part of the discussions with the Skipton Building Society about the change itself.

9. Even if that information did fall within the scope of the request, it would be exempt from disclosure under section 44.

10. The Appellant's position was that the information that the FSA received from the Skipton Building Society after the issuing of its letter to mortgage holders clearly fell within the scope of his request, given the wording of his request.

11. The IC decided that it was reasonable for the FSA to take the "contextual" view of the Appellant's request - that he was seeking copies of correspondence containing substantive discussions about the changes to mortgage interest rates that the Skipton Building Society was proposing - rather than any correspondence about subsequent reactions from mortgage holders to that change.

12. The Appellant was trying to obtain details of any consultations that may have taken place prior to the society making changes to mortgage interest rates and details of any objections the FSA may have made to those proposed changes.

13. As a result the IC determined that the FSA's interpretation of the scope of the request was a reasonable objective reading of that request. The IC decided that the correspondence from the Skipton Building Society providing the FSA with updates on responses to its change to mortgage interest rates - subsequent to the issuing of its letter to mortgage holders - did not fall within the scope of the request.

14. The IC Found that the exemptions relied on by the FSA were the appropriate and correct ones and that the requested information need not be released to the Appellant under FOIA.

The Law

15. By virtue of s.2 (3) FOIA, sections 40 and 44 FOIA are absolute exemptions to disclosure.

a. That absolute exemption at s. 40(2) FOIA provides, insofar as is relevant in this case:

i. Any information to which a request for information relates is also exempt information if-

1. it constitutes personal data which do not fall within subsection (1), and
2. either the first or the second condition below is satisfied.

ii. The first condition is-

1. in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene--

(i) any of the data protection principles, or...

b. The definition of "personal data" is found at s. 1(1) of the Data Protection Act 1998 ("DPA"). This provides:

"personal data" means data which relate to a living individual who can be identified –
(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

> and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

c. The data protection principles are set out at Part I of Schedule 1 to the DPA. The first data protection principle is that:

> Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
> (a) at least one of the conditions in Schedule 2 is met...

d. The IC concluded that disclosure of the withheld information would not be fair.

e. In so far as it relates to this appeal, section 43 FOIA provides:

> 43) Commercial interests.
>
> (1)...
>
> *(2)* Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
>
> *(3)* ...

f. The absolute exemption at section 44 FOIA provides:

> 44) Prohibitions on disclosure.
>
> *(1)* Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-
>
> *(a)* is prohibited by or under any enactment ..
>
> *(2)* The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section (1)(a)

would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

g. The Financial Services and Markets Act 2000 (FSMA) replaced the Financial Service Act 1986. Section 348 of FSMA states:

"S.348 Restrictions on disclosure of confidential information by Authority etc

(1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of-

(a) the person from whom the primary recipient obtained the information; and

(b) if different, the person to whom it relates.

(2) In this Part "confidential information" means information which-

(a) relates to the business or other affairs of any person;

(b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority, the competent authority for the purposes of Part VI or the Secretary of State under any provision made by or under this Act; and

(c) is not prevented from being confidential information by subsection (4).

(3) It is immaterial for the purposes of subsection (2) whether or not the information was received-

(a) by virtue of a requirement to provide it imposed by or under this Act;

(b) or other purposes as well as purposes mentioned in that subsection.

(4) Information is not confidential information if-

(a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or

(b) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.

(5) Each of the following is a primary recipient for the purposes of this Part-

(a) the [Financial Services] Authority ..."

h. The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999) were amended by the Unfair Terms in the Consumer Contracts (Amendment) Regulations 2001. (UTCC(A)R 2001).

i. In so far as is relevant to this appeal, Regulation 2 of UTCC(A)R 2001 states:

"Regulation 2

The Unfair Terms in Consumer Contracts Regulations 1999 are amended as follows:-

(a) By adding the following after

regulation 15- "The functions of the

Financial Services Authority

16. The functions of the Financial Services Authority under these Regulations shall be treated as functions of the Financial Services Authority under the Financial Services Act 1986[1]."

j. The Skipton Building Society is a mutual building society incorporated under the Building Societies Act 1986 and as such has legal personality for the purposes of this appeal.

The appeal to the Tribunal

16. The Appellant makes the following points in his appeal:

(1) **Section 44**

1. He argues that Section 44 FOIA is not applicable as the FSA was not a Primary Recipient of the information provided by the Skipton because it was an Unfair Fair Terms matter and not Supervision under FSMA rules. The FSA was acting as a Qualified Body under the Regulations for the Office of Fair Trading and not under FSMA.

2. FSMA 2000 was not the relevant legislation under which the Skipton sought advice but the UFTCC regulations, a separate piece of legislation which the FSA went to great lengths to explain in its handbook under the title "UNFCOG". He disputes the FSA's assertion that it can hold the information under both provisions.

3. The Skipton and the FSA should be open to an examination of their conduct as specified under the UFTCC Regs and not FSMA.

(2) **Section 43 (2)**

1. The Appellant points out that the FSA had stated that the interests of the Skipton were "likely to be harmed in certain ways" and further claimed the release of the information "would be likely to lead to further comment and speculation" which would or would likely harm the" commercial interests" of the Skipton and its stakeholders. Its review letter gave no indications of have conducted any of the required assessments about this and the Skipton - having had the opportunity to provide such information - chose not to provide any evidence to the FSA of any damage to its commercial interests.

2. On the “litigation risk”, the information requested was two years old and no evidence of any risk had been provided. The IC satisfied himself that the prejudice claim was not "trivial or insignificant" but no evidence had been produced that the prejudice is "real, actual or of substance".

3. There was a public interest in fully understanding the reasons for public authorities' decisions, to remove any suspicion of manipulating the facts, or 'spin'. The fact that the advice and the reasons for the decision might be complex did not lessen the public interest in disclosing it and may strengthen it. Similarly, the information does not have to give a consistent or coherent picture for disclosure to help public understanding; there is always an argument for presenting the full picture and allowing people to reach their own view. There is also a public interest in the public knowing that an important decision has been based on limited information, if that is the case.

(3) **Section 40 (2)**

1. The Appellant challenges the suggestion that individuals signing letters to the Skipton were not "in a public facing role". It was unreasonable to suggest that those making such decisions were unaccountable to the public if not by name then by position within the organisation for the decisions they took on behalf of the public.

2. The IC’s concern that FSA employees might have been diverted from their "normal duties" due to the "very large" number of people affected by the rise in the Skipton Mortgage rate. Neither the IC nor the FSA had provided any evidence of the extra work load. It was only speculation.

17. In essence the Appellant believed the FSA and the IC had mis-directed themselves on the application of FOIA. The "commercial interests" of

the Skipton had been exaggerated and unsubstantiated. The public interest test had not been applied correctly in the light of the number of members of the public affected by the decision of the Skipton to break its mortgage guarantee and its apparent use of the FSA "name" by the Skipton to support its actions.

Evidence

18. The Tribunal Judge disclosed to the Appellant and the IC in advance of considering this appeal that he was a non-industry member and now a Deputy Chairman of the former FSA's (now FCA's) Regulatory Decisions Committee (RDC). He had had no dealings with the Skipton Building Society. Both parties confirmed that they did not require him to withdraw from considering the appeal.

19. Tribunal had provided to it a closed and confidential bundle of documentation which included un-redacted correspondence and material relevant to the information request and the FSA's refusal to disclose it under the various exemptions claimed.

20. It has considered this material with vigilance and rigour, assessing whether all or any of it could be released in response to the information request. For the reasons which follow below the Tribunal finds that the exemptions were properly claimed and applied and that it is not necessary to issue a closed annex to this decision or to refer to the detail of the closed material.

Conclusion and remedy

21. We find that the IC's decision on the scope of the information requested was the correct decision in the context of how the request was made.

22. In terms of Section 44(1)(a) – the statutory prohibition on disclosure – we considered whether the FSA was a primary recipient of the

information; whether the request was for 'confidential information'; and, if so, whether there was consent to release the information or whether this could be obtained.

23. We concluded that the FSA *was* a primary recipient of the information and that the information in question was confidential information as defined in section 348(2) FSMA.

24. The information related to the business or affairs of the Skipton which, for these purposes, had its own legal personality. The information was received by the FSA for the purposes of, or in discharge of, its functions. The FSA was fulfilling a regulatory function when receiving the information in question.

25. Consent for its disclosure had not been given by the Skipton. We find that section 348 FSMA acts as a statutory prohibition on disclosure in this case and that the FSA had correctly applied section 44 FOIA to the information withheld under that section.

26. In terms of Section 43(2) - Prejudice to commercial interests – we find that the prejudice to the commercial interests of the Skipton which was claimed is sufficient to engage section 43(2) FOIA. Reviewing the disputed information – as we have done – we are satisfied that disclosure would result in a real and significant risk that the Skipton would face an increased risk of negative publicity, possible litigation and potential damage to its reputation. This would clearly be detrimental to its commercial interests

27. The public interest in maintaining the exemption outweighs the public interest in disclosure. We accept that there is a general public interest in accountability and transparency in relation to the activities of public authorities and that there was clearly a specific public interest in the disclosure of information which would shed light on the FSA's view of whether the decision by the Skipton was in compliance with the relevant

legislation. We also accept that disclosure would also provide the public with a greater insight in to approach adopted by the FSA in relation to the regulation of the UTCCR 1999 regime and increase public understanding of the relationship between the FSA and the organisations that it regulates.

28. However, disclosure could lead to the FSA's opinions and views being misconstrued generally, potentially misleading consumers and potential litigants. For the FSA to operate effectively and in the public interest, a system of regulation had to be fair; ad hoc publication of its views on issues raised with a regulated firm could be seen as unfair.

29. We find that the expectation that the detailed exchanges between regulated firms and the FSA takes place in confidence is a significant factor and loss of that confidence would undermine the FSA's ability to regulate effectively, because firms would become less open and candid in their dealings with it.

30. Disclosure would be likely to prejudice the commercial interests of the Skipton and there is a significant public interest in avoiding such prejudice. Disclosure of the FSA's detailed and frank exchanges with the Skipton on this issue would be very likely to lead to the Skipton, and other organisations, being more reluctant to enter into such exchanges with the FSA in future. There is a very significant public interest in the FSA being able to have such free and frank discussions with organisations in order for it to be able to effectively carry out its role as a regulator.

31. In terms of Section 40(2) - Personal information – we find that the names, contact details and signatures of employees of the FSA appearing on letters and emails to the Skipton clearly related to identifiable individuals and was also information about those individuals. We are satisfied that this information was the personal data of the third parties, the FSA's employees.

32. Although the individuals concerned may have had contact with an external stakeholder, namely the Skipton, they did not do so in a public-facing role on behalf of the FSA. Consequently, it would be reasonable for the individuals concerned, as less senior employees, to expect that their names would not be disclosed to the public at large in the context of the FSA's engagement with the Skipton.

33. In relation to the signature of the acting Head of Department, we are satisfied that it would have been reasonable for the individual concerned to have an expectation that his signature would not be disclosed to the public at large. Such signatures can easily be captured digitally and misused.

34. The names and contact details of the less senior employees could result in increased communications directed to them from members of the public and this could result in them being diverted or distracted from carrying out their normal duties. For the reasons given in the paragraph above, their signatures should not be disclosed.

35. Disclosing the withheld personal data would not be lawful because it would breach the first data protection principle. We find that the FSA correctly applied section 40(2) FOIA to the disputed information.

36. Our decision is unanimous.

37. There is no order as to costs.

Robin Callender Smith

Judge

8 July 2013