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IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2014/0077**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50512920
Dated: 10 March 2014

Appellant: **Jonathan Purle**

Respondent: **The Information Commissioner**

Heard on the papers: Fleetbank House

Date of Hearing: **29 July 2014**

Before

Chris Hughes

Judge

and

Nigel Watson and **David Wilkinson**

Tribunal Members

Date of Decision: **16 August 2014**

Date of Promulgation: **18 August 2014**

Subject matter:

Freedom of Information Act 2000

REASONS FOR DECISION

Introduction

1. On 19 July 2013 Mr Purle wrote to the Financial Conduct Authority (FCA) asking for information about discussions and correspondence with the European Commission concerning a consultation paper issued by the FCA's predecessor the Financial Services Authority "CPA 12/19 Restrictions on the retail distribution of unregulated collective investment schemes and close substitutes". The FCA responded confirming that it held information and refused to disclose it relying on section 44(1)(a) FOIA (the existence of a statutory prohibition on disclosure) and section 27 – prejudice to international relations. The FCA maintained that position subsequently and Mr Purle complained to the Information Commissioner (the ICO). In his decision notice the ICO upheld the FCA's reliance on section 44(1)(a) and did not consider section 27.

The appeal to the Tribunal

2. Mr Purle appealed to the tribunal disputing the applicability of the statutory bar on disclosure claimed – section 348 of the Financial Services and Markets Act. This provides, so far as is relevant to the appeal:-

> **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)for 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 Authority;

(b)any person exercising functions conferred by Part VI on the competent authority;

(c)the Secretary of State;

(d)a person appointed [F1to collect or update information under section 139E or] to make a report under section 166;

(e)any person who is or has been employed by a person mentioned in paragraphs (a) to (c);

(f)any auditor or expert instructed by a person mentioned in those paragraphs….

3. In his appeal Mr Purle focussed on section 348(2). He argued that "business or other affairs of another person" should be interpreted as relating to information about market participants. He argued that regulations made under section 349 provided exemption from the prohibition in 348 to allow disclosure to other bodies which were regulators who would be concerned about the activities of market participants and this, in his view, gave credence to his interpretation.

4. He argued that the European Commission was not a market participant and the information did not relate to internal matters about the Commission but rather about whether the FCA and the UK Government were complying with EU law and the Commission's view of such compliance.

5. The ICO maintained his position and submitted that there was nothing in the statue to justify the narrow interpretation placed on the provisions by Mr Purle.

6. In reply Mr Purle argued that *"if it was the intention of Parliament to render confidential and restricted by this section 348 all information provided by, or about, a person, including the views that such a person might have on the conduct of the Public Authority or compliance with EU law, the plain words would have said so." They do not, instead they limit the application of the confidentiality provisions in*

section 348, FSMA to the "business or affairs of a person". He argued that if the intention of Parliament had been so broad it would have used different wording.

The question for the Tribunal

7. The issue is a narrow point of statutory interpretation, whether s348 prohibits disclosure of communications between the FSA/FCA and the European Commission without the consent of the Commission.

Legal analysis

8. The Tribunal agrees with Mr Purle to this extent, there is no doubt that the primary focus of policy consideration and Parliamentary discussion will have been about how information about individual market participants would be treated in order to ensure an effective regime which maintained confidentiality for investigations by the various regulatory authorities involved in individual cases. However that is the extent of the Tribunal's agreement with Mr Purle. While that may have been the primary focus of debate; those framing the legislation will have wished to ensure that communications between those with responsibility for policy and enforcement were able to communicate confidentiality.

9. The Tribunal considers that the provision is widely drafted. Section 348(1) prohibits the disclosure of information by a primary recipient (in this case the public authority – FCA) without the consent of the "*person from whom the primary recipient obtained the information"*. The person in this case is the European Commission. The Commission is a person (the Interpretation Act 1978 repeats the definition of a person as *"includes a body of persons corporate or unincorporate"* and the Commission is incorporated by the various treaties of the European Union), the Commission has confirmed that it does not consent to disclosure of the information.

10. The information clearly (section 348(2)(a)) *relates to the business or other affairs of any person* in this case to the business or other affairs of the European Commission which is in this case commenting on the development of policy relating to financial markets within the EU. It was received by the FCA in the discharge of its functions of overseeing the development of UK markets and formulating policy for that development (section 348(2)(b)). It remains confidential because it has not been

published and is clearly identifiable as relating to the European Commission (section 348(2)(b) and 348(4)).

11. Section 44(1) provides that *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.* This is an absolute exemption and the s348 FSMA prohibition is clear.

Conclusion and remedy

12. The Tribunal is therefore satisfied that the ICO's decision notice is in accordance with the law and dismisses the appeal.

13. Our decision is unanimous.

Judge Hughes
[Signed on original]

Date: 16 August 2014