



Neutral citation number: [2024] UKFTT 332 (GRC)

**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2023/0389

**Decided without a hearing on 20 March 2024
Decision given on: 25 April 2024**

Before

**JUDGE ANTHONY SNELSON
TRIBUNAL MEMBER DAVE SIVERS
TRIBUNAL MEMBER KERRY PEPPERELL**

Between

MR JOHN EVANS

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE FINANCIAL CONDUCT AUTHORITY

Second Respondent

DECISION

On considering the written representations of the parties, the Tribunal unanimously determines that the appeal is dismissed.

REASONS

Introduction

1. The Financial Conduct Authority ('FCA'), the Second Respondent in these proceedings, is the statutory conduct regulator of the UK financial services industry.
2. In August 2022, the Appellant, Mr John Evans, sent a complaint to the FCA concerning the conduct of a particular bank ('the bank').
3. On 31 January 2023 Mr Evans, wrote to the FCA requesting the following information under the Freedom of Information Act 2000 ('FOIA')¹:
 - (1) Did the FCA investigate any complaints against [the bank] in 2022?
 - (2) Did any such investigation result in a Final Notice being issued to [the bank]?
 - (3) Did the FCA investigate the report I presented to them in regard to breaches of the FCA Rules by [the bank]?
 - (4) If so, what was the outcome of that investigation?
 - (5) If the FCA did not investigate my report, what was the reason for not undertaking such an investigation?
4. The FCA responded on 28 February 2023, refusing to confirm or deny that it held the information and citing s44.
5. On 5 March 2023 Mr Evans challenged that response and sought an internal review limited to parts (3), (4) and (5) of his request. Almost three months later, on 2 June 2023, the FCA upheld its original response and further stated that it would also have been entitled to refuse to confirm or deny in reliance on s31(3) (law enforcement).
6. On 4 July 2023, Mr Evans complained to the First Respondent ('the Commissioner') about the way in which his request for information had been handled. An investigation followed.
7. By a decision notice dated 21 August 2023 the Commissioner determined that the FCA had been entitled to rely on s44 to refuse to confirm or deny that the information requested was held. In those circumstances he did not judge it necessary to deal with the s31 arguments.
8. By a notice of appeal dated 30 August 2023, Mr Evans challenged the Commissioner's adjudication. The Commissioner resisted the appeal in his response dated 20 September 2023. To that Mr Evans served a reply dated 30 September 2023. Having been joined as Second Respondent, the FCA on 20 October 2023 served its response. On 3 November 2023 Mr Evans replied to the FCA's response.
9. The matter came before us for consideration on the papers, all parties having stated that they were content for it to be decided without a hearing. We were

¹ To which, unless otherwise stated, all references to section numbers below refer

satisfied that it was just and in keeping with the overriding objective to adopt this procedure.

10. A bundle of 264 pages was before us.

The Law

FOIA

11. FOIA, s1 includes:

- (1) Any person making a request for information to a public authority is entitled-**
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and**
 - (b) if that is the case, to have that information communicated to him.**

12. The right under s1 is subject to numerous exemptions. These may be 'qualified' or 'absolute'. Where a qualified exemption is in play, the information engaged by the request will be disclosable unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (s2(2)(b)). Where an absolute exemption applies, the duties to confirm or deny under s1(1)(a) and to communicate the information under s1(1)(b) do not apply (s2(1)(a) and 2(2)(b)).

13. This appeal is concerned with the exemption under s44, which includes, so far as material:

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

This exemption is absolute (s2(3)(h)).

14. The appeal is brought pursuant to FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

- (1) If on an appeal under section 57 the Tribunal consider -**
 - (a) that the notice against which the appeal is brought is not in accordance with the law; or**
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,**

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

15. In determining an appeal where the exemption under consideration is 'absolute', the Tribunal has no jurisdiction to consider the *reasonableness* of the relevant public body's action in maintaining the exemption. Its function is limited to a 'verification process', which involves an enquiry into whether the response to the request for information is founded on a proper understanding of the relevant facts and applicable legal framework (see *Ofcom v Morrissey & Information Commissioner* [2011] UKUT 116 (AAC), especially at paras 46 and 58).

The Financial Services and Markets Act 2000

16. The Financial Services and Markets Act 2000 ('the 2000 Act'), s348 enacts a prohibition on disclosure of 'confidential information' without consent² by, among others, the FCA. Contravention of that prohibition amounts to a criminal offence (s352).
17. By the 2000 Act, s348(2) 'confidential information' is defined as 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 FCA ... under any provision made by or under this Act; and
 - (c) is not prevented from being confidential information by subsection (4).

Subsection (4) excludes from the definition information already made available to the public without a breach of s348 or, if in the form of a summary or collection framed in such a way that it is not possible to ascertain from it information relating to any particular person.

18. It is well-established that the prohibition under the 2000, s348 is within the scope of FOIA, s44(1)(a) (see *eg Financial Services Authority v Information Commissioner* [2009] EWHC 1548 (Admin)).

The Rival Cases

Mr Evans's case

19. In his well-presented written representations, Mr Evans advanced three main arguments in support of his contention that the exemption under s44 was

² Consent is required from the 'primary recipient' (here the FCA) and the person to whom the information relates (s348(1)).

wrongly cited. First, the word ‘person’ in the 2000 Act, ss348 and 352 applies only to human beings and not to bodies corporate. Second, on a proper interpretation of the 2000 Act, s348, the information requested did not amount to ‘confidential information’. Third, the FCA’s response to his request confused its receipt of confidential information and its own decision-making.

The Respondents’ case

20. The Respondents submitted that all three grounds relied on by Mr Evans were wrong as a matter of law, that the FCA had rightly cited s44 and that the Commissioner had rightly found no substance in the appeal.

Analysis and Conclusions

Ground (a)

21. For three reasons, we are very clear that Mr Evans is mistaken on ground (a). In the first place, we agree with the submissions on behalf of the FCA that the use of the word ‘person’ in several places in the 2000 Act points clearly to a Parliamentary intention that it should extend to bodies corporate as well as human beings (see *eg* s31). Secondly, we can see no rational policy-based reason why Parliament might have intended the word ‘person’ to carry the artificially narrow meaning for which Mr Evans contends. Thirdly, we also agree with the FCA that, in any event, the presumption under the Interpretation Act 1978, Sch 1, namely that the word person ‘includes a body of persons corporate or unincorporate’, is applicable, there being nothing in the 2000 Act to displace it.

Ground (b)

22. We are equally unable to accept Mr Evans’s arguments under ground (b). Again, we have three reasons. First, we are compelled to give the term ‘confidential information’ the meaning which the 2000 Act attaches to it. We are not free to read words into s348(2) or to deem words to be deleted from it. If Mr Evans’s invitation to us to apply a ‘common sense’ interpretation is really an invitation to perform palm tree justice, it must be declined. Secondly, the definition in s348(2) is comprehensive and autonomous: it cannot be treated as merely amending or supplementing definitions derived from other sources (if authority were needed, see the *Financial Services Authority* case cited above, para 5). Thirdly, the (statutory) meaning of ‘confidential information’ is clear and, for reasons developed under ground (c), includes the information which Mr Evans has requested.

Ground (c)

23. Nor does Mr Evans’s third argument persuade us. In our view, it is based on a misunderstanding of how FOIA operates. The three requests persisted with are

directed to the same core question: what did the FCA do with the complaint? By replying with anything other than a NCND³ response, the FCA would inevitably have disclosed the fact of the complaint. To this, Mr Evans might quite understandably retort not only that he is well aware of the complaint (being the author of it) but also that the existence of the complaint is itself an undisputed fact in these proceedings. But this ignores a fundamental principle of our freedom of information law. Any disclosure in response to a request is a disclosure not only to the requester but to the whole world. So any response other than NCND would be a disclosure to the whole world of confidential information consisting, at the very least, of the fact of Mr Evans having made a complaint to the FCA about the conduct of a particular bank. Self-evidently, that fact constitutes information relating to the business or affairs of another person (the bank), was received by the FCA for the purposes of any functions of the FCA and is not excluded from being confidential information by 2000 Act, s348(4) (Mr Evans does not pray that subsection in aid).

Overall conclusion

24. The three grounds put forward by Mr Evans have no substance. The exemption under s44 is engaged. That being so, there is no room for a challenge to the FCA's discretionary decision to cite it and to provide a NCND response to the request. The Commissioner rightly dismissed Mr Evans's complaint.

Disposal

25. For the reasons stated, we conclude that the appeal must be dismissed.
26. Finally, we should say that it would be wrong to impute to us any view about the wider, policy-based arguments ventilated by Mr Evans. We would go further: there is obvious force in what he says about the need for a proper and transparent means of ensuring that financial institutions are held to account for any wrongdoing on their part. But these are considerations which fall well outside our remit in this appeal. Our function has been simply to determine whether the Commissioner went wrong in law in concluding that the exemption relied upon applied. Having found that he did not, we had only one course open to us, namely to dismiss the appeal.

Anthony Snelson

³ 'Neither confirm nor deny'

Judge of the First-tier Tribunal

Date: 20 April 2024