Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 August 2007

Public Authority: The Financial Services Authority
Address: 25 The North Colonnade
Canary Wharf
London
E14 5HS

Summary

The complainant requested that the Financial Services Authority (FSA) provide him with the names of any companies it had identified by it as using inappropriate charges in setting premiums when selling endowment mortgages. The FSA refused the request on the grounds that exemptions under section 31 (law enforcement), section 43 (commercial interests) and section 44 (statutory prohibition) applied. The Commissioner's decision is that the exemptions under sections 31 and 44 of the Act do not apply. He has also decided that the exemption under section 43 is applicable, but the public interest in disclosing the information outweighs that of maintaining the exemption.

The Commissioner's Role

1. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. On 1 January 2005 the complainant requested the following from the FSA:

"How many and which providers used 'inappropriate charges' to set premiums as described in the Financial Ombudsman Service (the' FOS') 'Decision Trees', I believe the FSA carried out a review of some sort in 2001. This would relate to ALL financial products sold between April 1988 and January 1995 (or later?)."

3. The FSA acknowledged the request on 4 January 2005. On 6 January 2005 it responded again to the complainant stating that it could not identify the information which the complainant was asking for and asking him to revise his request. It stated however that it did hold information in relation to a review carried out on mortgage endowments. The Complainant wrote back requesting this information.

4. On 31 January 2006 the FSA wrote to the complainant stating that the information he had requested was exempt from disclosure under the exemptions in sections 31 and 43 of the Act. It clarified however that it had carried out a review in 2001 that had identified 11 companies that had used standard LAUTRO charges between 1988 and December 1994 without clarifying that the LAUTRO examples provided did not in fact reflect the actual charges the companies used on their products. The FSA therefore judged that there had been a breach of contractual warranty by those companies. Although the companies were required to use the LAUTRO examples when selling their products they should have highlighted to customers that their own charges were higher and that higher premiums would need to be paid in order to meet the maturity figures intended.

5. On 16 February 2005 the complainant wrote to the FSA asking it to review its decision not to disclose the information to him.

6. The FSA responded on 18 May 2005 upholding its decision for the same reasons.

The Investigation

Scope of the case

7. On 19 May 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information the requested should have been disclosed to him.

Chronology of the case

8. The Commissioner wrote to the FSA on 5 January 2006 requesting any arguments the FSA wished to make in support of its application of the exemptions. The FSA responded on 25 January 2006. In that letter it provided further arguments in support of its position.

9. The Commissioner wrote to the FSA on the 23 August 2006 requesting the names of the 11 firms together with further information in support of the application of the exemptions. The FSA wrote back on 23 September 2006 providing further arguments in support of its case, but also stated that in the course of reviewing the documentation it had realised that there were in fact 12 companies rather than 11. In this letter the FSA also stated that it now believed that section 44 of the Act was applicable and that this section exempted the

information from disclosure to the complainant in addition to the other exemptions claimed.

10. The Commissioner subsequently telephoned the FSA and clarified that as the initial response to the complainant had provided incorrect information it was his view that the FSA should now clarify that this was the case to the complainant.

11. On 16 October 2006 the FSA responded to an email from the complainant and confirmed to him that there were, in fact 12 companies found in breach of a requirement under the Financial Services and Marketing Act (the 'FSMA') rather than 11. It confirmed that it had done this to the Commissioner in an email dated 17 October 2006.

12. On 15 May 2007 the Commissioner wrote to the FSA asking further questions relating to the application of the exemptions and the FSA links between the FSA and the FOS regulatory regime.

13. The FSA responded on 5 June 2007 providing its response to the questions asked.

Analysis

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14. The Commissioner has considered the public authority's response to the complainant's request for information.

Exemptions

15. The FSA applied 2 exemptions when refusing to disclose the information, section 31 and section 43. They later applied section 44 when providing arguments in support of withholding the information to the Commissioner.

Section 31

16. Section 31 provides an exemption to the disclosure of information where disclosure would, or would be likely to prejudice the purposes of law enforcement. The exemption is qualified in that it may only be used where the exemption in section 30 (investigations and proceedings carried out by public authorities), of the Act is not applicable. The FSA has confirmed that section 30 is not applicable in this case as they do not consider that the breaches highlighted in the review amount to a criminal offence, and feel that section 31 more closely fits the reasons why it considers the information should be withheld.

17. The FSA argues that section 31(1)(g) applies because disclosure of the names of the 12 companies would prejudice the exercise of its functions for the purposes of

- ascertaining whether any person has failed to comply with the law, in this case the Financial Services and Marketing Act (the 'FSMA')

- ascertaining whether any person is responsible for any conduct which is improper
- ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise, and
- ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on.

18. The FSA states that the above applies for a number of reasons, not least that it is still in regular contact with the companies involved, and that its relationship with them would be affected by disclosure, thereby prejudicing its ability to investigate and/or seek informal resolution to breaches in the future. It states that if the information was disclosed the FSA would not be able to provide companies with assurances that the information would not be disclosed and that as a result companies could refuse to provide information on an informal or voluntary basis.

19. In this case the FSA states that it approached the companies it had found to be in breach of requirements on an informal basis. As a result, each of the 12 companies voluntarily agreed to compensate their clients. The FSA did not therefore use its formal powers to publicly censure the companies as it considered that the breaches were rectified through the compensation payments.

20. The FSA explained that much of the information it receives from companies is provided voluntarily, without the need to use the compulsory powers available under the FSMA. It stated that it will often share findings and agree remedial action with companies without the need to use its disciplinary powers. It therefore prefers to ask companies to provide it with information relevant to its monitoring function and secure agreement to remedy any problems it has identified at an early stage. Remedies may include offering compensation to customers disadvantaged by a problem. If a company co-operates with this approach it does not expect to be the subject of the formal sanction of publicity.

21. The FSA states it is concerned that disclosure of the names of companies now would potentially undermine the willingness of these companies, and regulated companies in general, to engage in open dialogue with it. This would be likely to prejudice its monitoring functions for the purposes of section 31(2) of the FSMA by reducing materially the timeliness and comprehensiveness of the information it receives. If it was compelled to release the names of the companies this would be likely to result in companies volunteering the minimum amount of information in order to comply with its requirements.

22. The Commissioner has considered these arguments. The implementation of information access rights will already have had the effect of negating the FSA's ability to provide absolute assurances to companies that their names will not be published if they agree to resolve an issue via an informal agreement. In each case where a request is made for this type of information the FSA would need to justify why the information should not be disclosed under the Act, and where it is appropriate, provide sufficiently strong public interest arguments to justify withholding it. The FSA cannot therefore provide a company with any absolute assurances that a company can avoid having the FSA's findings disclosed as

rights under the Act may mean that the information needs to be disclosed if it is requested. The Commissioner therefore considers that this argument is not of sufficient weight to conclude that the FSA's functions would, or would likely to be, prejudiced..

23. The Commissioner does however recognise that in appropriate circumstances the statutory bar on disclosure in section 348 of the FSMA may allow such a promise as the exemption in section 44 (statutory prohibition) of the FOI Act would then apply.

24. The Commissioner queried with the FSA why it preferred to use informal discussion when it has formal powers which it can use to compel firms cooperation. The FSA explained that the use of compulsory powers presumes that it has some awareness of the information to be obtained and that it is sometimes the case that it is only when firms volunteer information or provide information that goes beyond that which is requested that it is able to appreciate the nature of the potential problem being faced. The FSA also highlighted that the costs involved in enforcement action to obtain information from firms would result in the FSA being unable to achieve as many outcomes as it currently does through its 'informal action' approach. The FSA has also explained how the informal approach often highlights areas of concern it would not otherwise be aware of.

25. The FSA also provided evidence from previous requests for similar information in which the firms were approached and the majority specifically requested their names not be disclosed.

26. Although the FSA argues that companies may become less willing to disclose information other than that specifically requested, the Commissioner notes that under section 171 of the FSMA an investigator may require a person to provide such information as the investigator requires for the purposes of an investigation. The legal definition of 'person' includes corporations and limited companies.

27. The Commissioner also recognises that it is in the interests of the firms to continue to have informal dialogue with the FSA, resolve problems and take remedial action. The FSA's formal powers extend to penalties such as fines and the Commissioner considers that a company would therefore be generally willing to take swift steps to rectify problems without the need for formal action to be taken regardless of whether this information could subsequently be disclosed. In addition to avoiding formal action, in agreeing to resolve a situation on an informal basis the companies would be able to demonstrate that they have rectified the problem as soon as it was highlighted to them by the regulator if the FSA's findings were ever made public. The Commissioner is not therefore satisfied that a disclosure would undermine the FSA's ability to carry out investigations.

28. The Commissioner does not therefore consider that the FSA has demonstrated that disclosure of the information in this instance would, or would be likely to, prejudice its functions under subsection 2 of section 31. Disclosure would not prejudice its ability to ascertain if a person has failed to comply with the law, whether a person's conduct is improper or in determining a person's fitness or

competence. Whilst the FSA has a preference to use its informal procedures, it has formal powers which can compel a company to comply. The Commissioner also does not agree that disclosure of the information would be likely to discourage firms from entering into informal action as this would still be in a company's best interests. In fact disclosure of the information could prompt companies to remedy situations more quickly in order to avoid more formal action being taken by the FSA. The Commissioner also notes that the FSA will continue to obtain information from other parties relevant to its functions – most notably the Financial Ombudsman Service (FOS). This will highlight areas of concern from complaints the FOS has received where it believes there may be a case for further investigation by the FSA.

29. For these reason the Commissioner finds that the exemption at section 31 of the Act is not engaged.

Section 43

30. Section 43 provides an exemption to the disclosure of information where disclosure would, or would be likely to prejudice the commercial interests of any party, or if the information is a trade secret. The FSA argues that disclosure would prejudice the commercial interests of the companies in that it could cause a loss of confidence in the market and/or result in companies being unable to gain new business. This would be against a backdrop where no formal action has taken place by the FSA, and no appeals have been heard to the findings in the FSA's review.

31. The Commissioner recognises that the historical nature of this information. The findings of the review relate to a period between 1988 and 1994, (after which the rules governing the disclosure of charges were changed). Together with the fact that the companies have already taken steps to rectify the shortfalls identified, the Commissioner considers that this is likely to reduce the likelihood that a disclosure of this information would prejudice the commercial interests of the companies involved at the time of the request.

32. He also considers that disclosure would be unlikely to cause a loss of confidence in the market given that the shortfalls in many endowment mortgages are well known and widely publicised, and have been for a number of years. Steps to rectify the problems with these types of mortgages have been taken including direct contact with customers by the FSA and others. Significant safeguards have also been implemented to ensure the regulatory overview of endowment mortgages is appropriate. It has also been well publicised that the FSA found against 11 companies in its review, and that some of the companies then went on to compensate their customers. The markets will not therefore be surprised by the substance of the disclosure, but will merely be able to attribute the findings to some of the companies involved for the first time.

33. Press comment on the subject already includes statements from some companies indicating that they have accepted the findings of the review, and that they have therefore compensated customers for any losses suffered. The FSA has provided no evidence to suggest that the disclosure of this information in the

press was commercially prejudicial to those companies beyond that directly attributable to making compensation payments to complainants. The Commissioner's view is therefore that the market is unlikely to be commercially prejudiced by the disclosure of this information.

34. The Commissioner queried with the FSA why, when formal action has been taken the impact on a firm's commercial interests was not considered prejudicial but disclosure where none has taken place would. In response the FSA stated that adverse publicity about a firm is regarded as a sanction in its own right. This is because in a competitive market a good reputation is considered to be of value and an asset worth protecting. When a firm is facing disciplinary action it has to choose whether to contest it with the resultant bad publicity and harm to its reputation, or whether an agreement can be reached at an early stage which will not become public. The Commissioners argument in paragraph 21 above highlights however that absolute assurances of this nature can no longer be relied upon by the FSA as a lever to obtain informal disclosure in any event.

35. The information relates to the companies which were identified by the FSA's review as having breached a contractual warranty and/or of material pre-contractual misrepresentation in the sale of endowment mortgages. Endowment mortgages are a very specific area of sales in which the market has decreased dramatically. According to the Council of Mortgage Lenders, the percentage of interest-only mortgages with a specified Repayment Vehicle (which includes but is not limited to endowment mortgages) in 2005 was 4% for first time buyers and 4% for home movers. This currently represents a very small segment of the market in which firms already have very few new sales.

36. However in the late 1980's and early 1990's endowment mortgages sold strongly based upon the market conditions of that time. It is noted that complaints about endowment mortgages are still the highest level of complaints the FOS receives some decades after their popularity has waned. The FOS annual review shows that in 2005/2006 61% of complaints received by the FOS were about endowment mortgages. Figures from an FSA initiated review in 2005 suggest that 2.2 million households face an average shortfall of £7200 on their endowment policies, although it further highlighted that many of these had either already been addressed by the customer, or they were in the process of doing so.

37. The FSA has also published information about some companies it has taken formal action against in relation to the mis-selling of mortgage endowment policies. Its formal actions have also, on occasion involved large fines being laid against companies. No evidence has been provided that this has specifically resulted in a prejudicial effect on the company's overall commercial interests; however the Commissioner considers it likely that a significant ruling by the FSA on a particular company which is reported in the national press could prove dissuasive to some prospective customers.

38. The Commissioner's view is therefore that prejudice is likely to occur to some extent by the disclosure of this sort of information. It is his view that this was one of the reasons for introducing the public censure enforcement powers in the first

instance. The qualification of that power also suggests the detrimental effect public censure may have on a company.

39. The Commissioner has already noted that the press has published articles on the review. They have also mentioned that some companies have made compensatory payments as a result of it and speculated on the identity of some of the other companies they think may be involved. It is therefore likely that a disclosure of this information would generate a further degree of press interest and in doing so provide a certain amount of detrimental publicity for the companies concerned; particularly for those companies whose identity has not yet been publicly revealed. This may have a detrimental effect on the company's business reputations which could possibly affect their future sales to a limited degree. He is aware however that problems associated with endowment mortgages were a large factor in their waning sales, and that very many companies who sold such products were affected by the issues involved; hence the percentage of complaints still being received by the FOS. His view is therefore that any commercial detriment would be lessened by the overall scale of the problems associated with endowment mortgages in general.

40. Taking all the above issues into account, the Commissioner is satisfied that section 43 is engaged as a disclosure of the requested information would, or would be likely to, prejudice the commercial interests of the companies which would be named through the disclosure.

41. Section 43 is a qualified exemption, and so the Commissioner has carried out a public interest test. This is dealt with below.

Public Interest Test

42. The Commissioner has decided that the exemption in section 43 of the Act is engaged by the information in that he has found it likely that a disclosure of the information would be likely to prejudice the commercial interests of the companies involved to a degree. A disclosure of the names of the companies could cause damage to their business reputations which would be likely to affect the future sales of their products. He has however taken into account that the general bad publicity surrounding endowment mortgages has substantially affected all of the providers of such products in any event, and that the degree of damage likely by the disclosure of this information is likely to be far less because of this. He has also taken into account the fact that the FSA has stated that compensation payments have already been made by the companies involved, and that some of the companies have publicly admitted they were at fault and that they have therefore compensated their customers. In the Commissioner's view this is likely to reduce any commercial detriment which is suffered as a result of a disclosure in response to this request. With this in mind the Commissioner has considered whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

43. The current sales of endowment mortgages amount to only a very small percentage of the overall sales of mortgages at the current time, however during the period the review looked at endowment mortgages were the most popular

means of funding a mortgage loan. The figures provided in paragraphs 35 above highlight the sensitivity of issues surrounding the general problems associated with endowment mortgages. There is therefore a great deal of public interest in the disclosure of information which would help highlight the issue in greater detail.

44. The importance to the general public of providers having a fair and upright approach to selling mortgages has been publicly recognised in the past. In a decision notice issued by the FSA against a company in 2003, it stated that the failings it had found demanded a significant financial penalty given that:

> "they related to the sale of endowment policies used as vehicles to repay mortgages -a mortgage is for most people the most significant financial transaction of their lives, and where it is mis-sold, it can have the most serious of consequences."

45. Given the amount of people who bought these products, and given the number of complaints still received by the FOS concerning them the Commissioner is satisfied that there remains a great deal of public interest in the disclosure of any information which sheds light on the problems associated with them in greater detail.

46. The resultant press response to a disclosure of the names of the companies involved could help highlight the ongoing issues surrounding endowments, particularly at a time when many of the companies involved are setting time limitations on contractual claims against them. The Commissioner notes that purchasers of endowment mortgages should have received letters informing them that this is the case, however media interest would heighten the public's awareness of this factor further and may result in further claims being made. The FSA's review of 2005 indicated that approximately 11% of purchasers contacted had not at that time considered taking legal action or complaining to the FOS about the status of their loan. Accordingly there may be many purchasers who have a right to compensation who may be more inclined to make complaints if they are aware of the FSA's findings on these particular companies. The FSA states that 50% of the endowment mortgages sold were through the 16 top providers of such products. The Commissioner is not aware whether any of those named fall within this band of companies, however if this is the case there may be many thousands of people affected by the findings of this review.

47. The primary reason for withholding the information is that the FSA may have provided assurances to the companies concerned that if they compensated customers no formal action would be taken against them. The names of the companies would not therefore be disclosed and their business reputations protected. In resolving complaints in this informal manner the FSA states that its investigations are more efficient, and that it retains good relations with the companies it regulates, thereby allowing it to obtain information from the companies it would not have otherwise obtained. The Commissioner has considered, but does not agree with this suggestion.

48. He also considers that if a disclosure takes place at this time the FSA would not be reneging on their agreements with the companies not to take formal action

against them. The Commissioner is however aware that one of the central reasons the companies may have had for agreeing to compensate their former clients informally, i.e. to maintain business reputation, would be affected.

49. If disclosure does prejudice the commercial interests of those companies involved to a small degree the Commissioner notes that this would not have a negative effect on the market as a whole. If potential purchasers of mortgage products are dissuaded from purchasing from any of the named companies they would be still likely to purchase similar products from other providers. He also notes that not all of the financial companies in practice when endowment mortgages were at their most popular are likely to have been affected by their shortcomings. Accordingly the Commissioner does not consider that the market as a whole would be harmed further by this disclosure.

50 The Commissioner therefore considers that prejudice to commercial interests may be limited to those companies who have not previously been named by the press. He also considers that any prejudice caused is likely to be limited due to the previous press coverage of the issues involved. The Commissioner considers that the public's level of trust in such companies will not therefore be damaged to any great extent and that the competitive market in financial products will remain buoyant should this information be disclosed.

51. In favour of disclosing this information is the fact that disclosing this information would add to the public debate on products which have caused major concern amongst the general public for very many years. It would highlight at least one of the factors which contributed to the problems associated with these types of mortgages. It may also highlight to customers that a degree of compensation may be available to them if they have not received any to date, which may in itself allow further debate about the implementation of contractual claim limitations which are being set in place by various companies and whether this is appropriate where mis-selling can be proven to have taken place.

52. Further public oversight of this issue may also, ultimately ensure fairness in relation to applications or complaints, reveal further malpractice or enable the correction of misleading claims by any of the companies involved if any have taken place.

53. The Commissioner also considers that a disclosure of this information could ultimately highlight the FSA's actions in this case. It would highlight that no formal action was taken against these companies, which would allow the general public to ask why this was the case. Disclosure may lead to a greater understanding as to how the FSA carried out its duties.

54. The FSA 's arguments are that disclosure would prejudice the commercial interests of the companies whose information it is withholding, which would in turn undermine good relations with those companies and so detrimentally affect its ability to investigate complaints in the future. On the counter side the Commissioner has considered the many thousands of people who have been affected by the actions of these providers in, for most people "the most significant financial transaction of their lives". The Commissioner has considered and

balanced these competing interests. It is his view that, in all the circumstances of this case, the public interest in maintaining the exemption do not outweigh the public interest in disclosing this information.

Section 44

55. Section 44 of the Act provides an exemption to disclosure where the requested information is covered by a statutory bar on disclosure. Section 348 of the FSMA provides a statutory bar on the disclosure of some information where that information is confidential and the provider has not consented to its disclosure. The FSA has however explained that it does not consider that the information falls within the scope of this section.

56. However the FSA argues that a statutory bar occurs because of the safeguards placed on its statutory powers under sections 207 and 208 of the FSMA. These sections require the FSA to issue warning notices to companies about any formal action being considered by it against them (including public censure). Companies receiving such a notice then have a prescribed period to appeal the FSA's decision prior to its enforcement powers actually being used.

57. The FSA argues that providing the names of the organisations through a request under the Act would circumvent this process. It would therefore undermine the due process required when publishing a statement through its formal enforcement powers. The names of the companies would be provided to the requestor with no right of appeal on their behalf to the allegations made in the FSA's review.

58. In establishing the context of this argument the FSA provided a document highlighting parliamentary concerns in the committee stage of the implementation of the FSM Bill. It states that these concerns led to the implementation of the due process requirements which act as a degree of protection against the FSA's enforcement powers. It also argues that the qualification of its formal powers were implemented in order to bring the FSMA in line with the UK common law concept of fairness and the requirements of the Human Rights Act (HRA). The discussions in the document centred on the view that a decision by the FSA could lead to companies receiving a large fine, and that the legislation as it stood at that time did not impart all of the rights required where such a decision was taken.

59. The FSA states that a disclosure of the names of the companies in this instance would amount to a statement of misconduct or public censure which would not follow the due process requirements set in place as a result of this document. As UK law should be read in a way which is compatible with the HRA the FSA's argument is that there is a statutory bar on the disclosure of this information without the due process requirements first being met.

60. The Commissioner has considered this argument and does not agree that this is the case. Sections 205 – 208 of the FSMA set in place procedures to allow the FSA to make a formal statement of non compliance with a requirement of that Act. The Commissioner considers that there is a significant difference between a formal statement of non compliance as published under these sections and a disclosure as a result of an FOI request. A disclosure under FOI requires no

formal warning procedures and disclosure under this access regime differs from a formal statement of non compliance issued by the regulator in that the information is not being issued by the regulator as a formal sanction under its enforcement powers. Accordingly the Commissioner's decision is that there is no statutory prohibition in place on the disclosure of this information and therefore (leaving aside any aspects arising by virtue of the Human Rights Act (HRA)), the exemption in section 44 of the Act does not apply.

61. However in highlighting its arguments for a statutory bar applying the FSA also provided an argument that it should not disclose this information because doing so would interfere with each company's rights under Article 6 and 8 of the HRA.

62. The document the FSA supplied was from the first committee report on the FSMA. The section covered an opinion by Lord Lester of Herne Hill and Javane Herberg. The FSA points out that the opinion centres around the necessary safeguards needed within the FSMA to ensure that the Human Rights Act is complied with. Of particular relevance in this section is a section relating to the presumption of innocence in criminal trials, and on the need for fairness in civil proceedings.

63. It is noted that the agreement by the companies to rectify the problems does not, of itself mean that the companies admit or agreed any wrongdoing on their behalf– merely that problems had been identified by the FSA and that they agreed to take action to resolve that problem. Arguably a decision by a particular company to pay compensation to a customer could have been led more by a wish to be seen to be fair to their customers rather than any admission of fault on their behalf. Equally the company may have wished to avoid the cost and/or any commercially damaging press coverage a legal challenge against the FSA might have incurred.

64. Because of the nature of the request in this instance – *"How many and which providers used 'inappropriate charges' to set premiums as described in the FOS 'Decision Trees'",* it can be argued that a disclosure of the names of the companies in response would carry with it a presumption of guilt or fault which the companies have not had the opportunity to properly defend against in law. Certainly the FSA could issue a caveat stating that this was not the case, however it is questionable how effective such a statement would be given that it was the FSA's review which found the companies in breach of an FSMA requirement in the first instance. The question the Commissioner considered therefore is whether a disclosure at this time could amount to a breach of the companies' rights under Article 6, (the right to a fair trial). There would be no formal right to appeal at this stage, and the companies concerned would effectively be being sanctioned without a route to argue their side of the case. The fact that they had compensated customers could also lead to a prejudgement of guilt on their behalf.

65. The Commissioner considers this argument holds some weight. A disclosure of the names in response would possibly imply to the general public at least some degree of guilt or fault was attributable to a company where no real case had been heard or proved in law.

66. However the Commissioner is mindful of the fact that the companies did have an opportunity to discuss and dispel the FSA's findings at the time the findings of the review were presented to them. The companies would also have had the right to appeal the review findings at that time if the FSA had taken the formal route. It was open to the companies to declare to the FSA that they disagreed in law with its findings and appeal any formal action the FSA chose to take against them at the time. Accordingly the Commissioner's view is that rights under Article 6 were met, but that it was the company's choice not to make use of that right.

67. Article 8 of the HRA protects private and family life. It is questionable whether this would apply to the companies in this case, although it is accepted in English law that the term "person" can include legal entities such as companies. The Commissioner has considered a case which has bearing on this case; Fayeed v United Kingdom (1994). The Fayeed family took a action against investigators hired to investigate claims against them by The Department of Trade and Industry (the 'DTI'). They claimed that their article 8 rights had been breached by the suggestion that they had acted dishonestly when making a takeover bid for the House of Fraser Group of companies. In that case the ECHR ruled that publishing a report criticising the integrity of the Fayeed family's submissions was not dispositive of any rights as regards the right to have a good reputation. The Commissioner notes that in the case a distinction was made on the grounds that the report was drafted by investigators appointed by the DTI to look into the affair as a precursor to potential legal action being taken against the family by it or by a court. The court felt that by its very nature such a report would need to include such information where it was appropriate to do so for the purposes of considering with full knowledge of the facts whether any legal action should be taken. It also decided that any ruling against the report's authors could lead to a position where all investigators would be open to be challenged in this way, and that this was clearly against the public interest.

68. As discussed previously in this case the FSA acts as the investigator and the first line adjudicator on complaints of this sort: it investigated and took informal action against the companies, and has confirmed that it would have moved on to take more formal action had any of the companies refused to informally address the breaches it had found. The Commissioner's view is however that any disposition of rights which could be argued by the disclosure of this information could have been refuted and fought through the correct appeals procedures had any formal adjudication been taken at that time. The companies' agreement to pay out compensation to its customers, albeit that this may have been for reasons other than or in addition to a blanket acceptance of the findings of the review, prevented the ability to refute the FSA's findings at this point in time. This was however the companies' choice to make at that time.

69. The Commissioner's decision is therefore that Articles 6 and 8 of the HRA would not be interfered with by the disclosure of this information. Accordingly the Commissioner's conclusion is that HRA considerations do not change his view that the section 44 exemption does not apply in this case.

The Decision

70. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with section 1 of the Act, in that it did not supply the requested information to the complainant, but instead inappropriately applied exemptions under sections 31, 43 and 44 of the Act.

Steps Required

71. The public authority must take the steps required by this notice within 35 calendar days from the date of this notice.

- The public authority should disclose the names of the 12 companies to the complainant.

Right of Appeal

72. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 7th day of August 2007

Signed ……..

Richard Thomas
Information Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annexe

Law enforcement

31. - (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime,
(b) the apprehension or prosecution of offenders,
(c) the administration of justice,
(d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
(e) the operation of the immigration controls,
(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
(i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are-

(a) the purpose of ascertaining whether any person has failed to comply with the law,
(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
(e) the purpose of ascertaining the cause of an accident,
(f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
(g) the purpose of protecting the property of charities from loss or misapplication,
(h) the purpose of recovering the property of charities,
(i) the purpose of securing the health, safety and welfare of persons at work, and
(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

Commercial interests

43. - (1) Information is exempt information if it constitutes a trade secret.

(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) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

Prohibitions on disclosure

44. - (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,
(b) is incompatible with any Community obligation, or
(c) would constitute or be punishable as a contempt of court.

(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) to (c) of subsection (1).