

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 August 2007

Public Authority: Financial Services Authority (the "FSA")
Address: 25 The North Colonnade
Canary Warf
London
E14 5HS

Summary

The complainant requested that the FSA supply him with information relating to a mystery shopping exercise into the sale of equity release products. The FSA refused to disclose some of the information under section 44 and some of the information under section 43. The Commissioner upheld the application of section 44 for all but one category of information, however, for the material withheld under section 43 the Commissioner found that the public interest lay in disclosure. The Commissioner requires the FSA to disclose the information withheld under section 43 and the information incorrectly withheld under section 44 within 35 calendar days from the date of this notice.

The Commissioner's Role

1. The Commissioner's duty 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. The complainant has advised that on the 27 May 2005 he requested the FSA disclose the following information:

"Information in relation to a 'mystery shopping exercise' which the FSA undertook in connection with equity release products to include the following information

1. *A list of the firms which were used for the mystery shopping exercise*

- 2. The result of that exercise by firm*
 - 3. The results of that exercise by adviser*
 - 4. The identities of the seven firms investigated on subsequent investment advice*
 - 5. The results of that exercise by firm*
 - 6. The results of that exercise by adviser.*
3. The FSA responded on the 16 June 2005 confirming that it held the information requested but that all the information was exempt from disclosure. In particular the FSA stated that the information requested in point 2, 3, 5 and 6 was exempt by virtue of sections 44 'Prohibitions on Disclosure' and 40 'Personal Information' of the Act. The FSA stated that section 348 of the Financial Services and Markets Act 2000(FSMA) prohibited disclosure of confidential information obtained by the FSA for the purposes of discharging its functions under FSMA.
4. The FSA stated information contained in the requested documents was the personal data of individuals and that disclosure would breach the first data protection principle. The FSA stated that the advisers concerned had not consented for their data to be released and disclosure would be detrimental to them.
5. In relation to points one and four of the complainants request the FSA withheld this information under section 43 'Commercial Interests'. The FSA stated disclosure would harm the firms' commercial interests and that the public interest lay in maintaining a climate where regulated firms are open with the FSA and that adverse publicity, without allowing the firms the benefit of protection given to them by Parliament would harm its relationship with the regulated firms and damage its effectiveness and efficiency as regulator.
6. On the 27 September 2005 the complainant contacted the FSA to request an internal review of the decision. The complainant asked the FSA to review its decision to withhold the information under sections 40, 44 and 43.
7. The FSA completed its internal review and communicated the outcome to the complainant on the 8 November 2005 upholding the original decision to withhold the information under section 40, 44 and 43.

The Investigation

Scope of the case

8. On 14 November 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular the complainant asked the Commissioner to investigate the FSA's refusal to disclose the information under the exemptions cited and consider the public interest arguments for disclosing the information.

9. The Commissioner's investigation focused on the FSA's application of the exemptions and consideration of the public interest arguments put forward for the application of section 43.
10. Section 44 has been applied to all the information requested in parts two, three, five and six. Section 40 was also applied to some of the information in these parts so the Commissioner first sought to establish if section 44 applied before deciding if it was necessary to consider section 40.

Chronology

10. On the 6 February 2007 the Commissioner began his investigation by contacting the FSA. In his letter the Commissioner requested further information regarding the application of each exemption and to see a copy of the information being withheld.
11. The FSA responded on the 21 March 2007 in full and included a copy of all the information being withheld. The FSA enclosed: in relation to point one of the request a list of the firms mystery shopped; in relation to points two and three of the request an example of the questionnaire used; the information withheld in relation to point 4 of the request; and examples of the information withheld in relation to points five and six.
12. In disclosing the information the FSA explained that it now believed that section 44 of the Act applied to all the information being withheld apart from the names of the firms investigated further as requested under point 4 of the initial request, to which section 43 applies.

Findings of fact

13. The FSA explained that a large amount of information is held for each firm mystery shopped and each firm further investigated. The FSA supplied to the Commissioner an example of the information held for a firm which was both mystery shopped and further investigated. The FSA explained that the information held would be similar for each firm (although for those mystery shopped only, the information would be limited to their name and a questionnaire). The Commissioner accepted the example provided as representative of all the information held in relation to the complainant's request. The information held in relation to the complainants request is therefore as follows:
 - 1. A list of the firms mystery shopped
 - 2 and 3. The questionnaires completed by the mystery shoppers.
 - 4. A list of firms further investigated.
 - 5 and 6. A covering letter to the firms; Index of the report, Summary of findings; Suitability document and the Analysis of the Client Files carried out in the further investigation.

14. The mystery shopper exercise took place on the 31 October 2004. The second strand of work referred to by the complainant as 'the further investigation' took place in 2005 and involved a series of visits to firms.
15. In relation to point 4 of the request the FSA have applied section 43. In relation to points 1, 2 and 3 the FSA have applied section 44 and section 40 to the names of the advisors. In relation to points 5 and 6 the following exemptions have been applied to the different parts of the information held.
 - Covering letter – section 44 and 43
 - Index of report – sections 43 and 40 (to the name of an advisor)
 - Summary of findings – sections 43, 44 and 40 (to the name of an advisor)
 - Suitability document – withheld under section 43, 44 and 40 (to the name of an advisor)
 - Analysis of client files – withheld under section 44 and 40 (applied to the name of advisors and the names and financial details of the clients).
16. The statutory prohibition being applied is section 348 of the Financial Services and Markets Act. The FSA also stated that it also considered that in addition to section 348 of the FSMA, Article 6 and 8 of the Human Rights Act also act as a statutory bar to disclosure of the information withheld under section 44.

Analysis

Exemption –Section 44 'Prohibitions on disclosure': Section 348 of the Financial Services and Markets Act.

17. Section 44 provides that information is exempt if its disclosure by the public authority is prohibited under any enactment.
18. Section 348 of the Financial Services and Markets Act (FSMA) provides that confidential information must not be disclosed by the FSA without consent. In order to establish if the information is covered by the statutory bar the Commissioner must consider the following: is the information confidential under the terms of the FSMA? Has consent been given? Has the information already been disclosed to the public? And could the information be provided in the form of a summary so it is not possible to ascertain to whom the information relates?
19. The Commissioner first set out to establish if, for the purposes of section 348 of the FSMA, if all the information withheld under section 44 is confidential information. Confidential information as defined by section 348(2) must have been received, by the FSA as part of its functions as the regulatory body overseeing the financial services industry and be information which relates to the business or other affairs of any person. The legal definition of 'person' includes corporations and limited companies.

20. The FSA applied section 44 to the names of the firms mystery shopped. During the course of the investigation the FSA confirmed that the only statutory bar being considered in withholding the names of the firms is section 348 of the FSMA. In deciding if the names of the firms are considered to be confidential information the Commissioner considered the method in which the firms were selected to be mystery shopped. Initially the FSA stated that the names of the firms was information 'received' by the FSA from the research firm engaged to undertake the mystery shopping exercise. However, the FSA clarified that the FSA chose the majority of the firms to be mystery shopped. The basis on which the FSA choose the firms was market position rather than suspicions of non compliance. The other firms names were chosen by the shopper based on local knowledge. The Commissioner finds that the names of the firms that chosen by the FSA who were mystery shopped is not confidential information for the purposes of section 348 of the FSMA as it is not information 'received' by the FSA but is a list of names it selected due to its knowledge to the market. The Commissioner does however find that the names of the firms selected by the mystery shoppers can be said to be received information for the purposes of 348 of the FSMA.
21. In support of this decision the Commissioner notes that the FSA explained that it holds information generated internally about regulated firms such as opinions, view, action to take and questions to be asked. This is termed internally generated information by the FSA and the FSA does not consider this to be 'received' information for the purposes of section 348.
22. The other information being withheld under section 44 is the questionnaires and parts of the information obtained directly from the firms during the course of the FSA's further investigation. The FSA explained that the mystery shopping exercise was tendered out to a research company who in turn employed the mystery shoppers. The FSA chose the majority of the firms and set the scenarios for the mystery shoppers to follow. Following this the FSA investigated a further seven firms, making a supervisory visit and examining client files.
23. This information can all be said to be information the FSA has received from firms under it investigatory powers and is therefore 'received' information for the purposes of section 348 of the FSMA. The mystery shopper exercise is a diagnostic tool the FSA uses in discharge of its functions of monitoring the compliance of firms with its regulatory requirements. The investigation carried out further is an extension of this practice.
24. The Commissioner is therefore satisfied that the information in question was confidential information obtained by the FSA for the purpose of discharging its functions as the regulator of the financial services industry.
25. Section 348(1) states that confidential information must not be disclosed without the consent of the person from whom the information was obtained from or if different to whom the information relates. The FSA have not consulted the firms to check if they would consent to disclosure; and those firms who were not investigated further have not been informed that they were mystery shopped. The FSA felt that in light of this it was unlikely that consent would be given. In the recent Information Tribunal decision '*Slann vs. Information Commissioner*' the

tribunal noted that the section 45 Code of Practice discusses consultation with third parties and concludes that where an absolute exemption is engaged there is no room for the Code of Practice to operate.

26. Section 348(4) allows that information is not confidential if it has already been disclosed to the public or is in the form of a summary or collection of information framed so that it is not possible to ascertain information relating to a particular person. The information requested has not already been disclosed to the public and where section 44 has been applied it is to the names of firms and the results of the exercise. The FSA did consider if the information could be provided in an anonymised format but this would result in figures of meaningless data. The FSA also confirmed that the information has not already been disclosed to the public.
27. Section 349 of the FSMA states that section 348 does not prevent disclosure of confidential information which is made for the purpose of the carrying out of a public function and permitted by regulations made by the Treasury under this section. In the recent Information Tribunal decision '*Slann vs. Information Commissioner*' the Tribunal found that the term public functions related to powers conferred on the FSA by legislation and not legislation such as FOIA, to which it was subject. Therefore making a disclosure under FOI was not carrying out a public function.
28. The Commissioner therefore finds that the information withheld under section 44, apart from that identified in paragraph 20 is covered by section 348 of the FSMA and that section 44 of the Act is engaged where applied. As section 44 is an absolute exemption there is no requirement to consider the public interest test. The Commissioner therefore did not investigate the application of section 40.

Exemption – Section 43 'Commercial Interests'

29. Section 43(2) provides that information is exempt from disclosure if disclosure would, or would be likely to prejudice the commercial interests of any person (including the public authority). The exemption is qualified and subject to the public interest test: in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
30. The FSA have applied section 43 to the names of the firms further investigated (part 4 of the request). The FSA have also applied section 43 to sections of the covering letter; index; summary of findings and suitability document: this is information that is limited to its opinions and analysis of the information gathered from the investigation.
31. The FSA argue that disclosure of information withheld under section 43 could lead to a loss of confidence in the market or result in the firms being unable to attract new business, and consequently have negative effects on share price. The fact that a firm has been named by the FSA for non-compliance could cause a general loss of consumer confidence in the firm and the publicity could lead to an increase in complaints from customers which, on analysis, may turn out to be unjustified.

32. The FSA explained that the small number of firms which were visited would attract adverse publicity in circumstances where there has been no systematic survey of the state of the market as a whole and therefore no equal treatment of all participants. The firms involved could reasonably argue that the findings are based on a limited sample size that is not truly reflective of their market penetration and practices and was designed to allow the FSA to publish the results quickly, so that firms in the particular market are aware of the issues raised and can make changes if necessary. Ad hoc disclosure would therefore be likely to attract more attention than would be the case under a regime where public disclosure took place.
33. The FSA also argued that disclosure of this information would harm its dealings with firms, which would make them less willing to cooperate with it voluntarily in achieving its regulatory objectives and therefore harm its effectiveness as a regulator. The Commissioner does not accept that this argument relates to the likely prejudice disclosure would have on the firm.
34. For the reasons above the Commissioner is satisfied that section 43 is engaged as disclosure of the names of the firms the FSA investigated following the mystery shopping exercise and the opinions and analysis of the FSA, would or would be likely to prejudice the commercial interests of the firms involved with the mystery shopper exercise. In reaching this conclusion the Commissioner has considered the competitive nature of the equity release market. Whilst the Commissioner accepts that section 43 is engaged he notes that to some extent the severity of prejudice as described in paragraph 32 would be reduced if the FSA disclosed the information explaining the context and background to the mystery shopping exercise. This also has relevance to the Commissioner's considerations of the public interest test in the following section.
35. The Commissioner has applied the test for 'would or would be likely to prejudice' as set out in the Tribunal decision EA/2005/005 *John Connor Press Associates vs. the Information Commissioner*. The Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (Para 15). This was further expanded in the Tribunal decision *Hogan vs. the Information Commissioner EA/2005/0026* and *Bexley vs. the Information Commissioner EA/2006/0060*.
36. In these cases the Tribunal considered what was meant by "would be likely to prejudice" and when a prejudice based exemption might apply: that 'prejudice must be real, actual and of substance' and that 'the occurrence of prejudice to the specified interests is more probable than not and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not'. In this case there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.

The public interest in maintaining section 43(2)

37. Section 43 is a qualified exemption and is therefore subject to the public interest test. In considering the reasons why the public interest lies in maintaining the exemption the FSA has put forward the following arguments.
38. The FSA has published a large amount of information for consumers, about equity release, providing explanations and encouraging them to consider their options. Harm to firms being exposed to public criticism when they have not had due process outweighed the desirability of consumers having access to a wide range of information to help make their choices. The Commissioner also noted that the impact of this exposure would be reduced by the FSA explaining the context of the mystery shopping exercise alongside any disclosure.
39. The FSA also argues that adverse publicity without allowing the benefit of protections given to them by Parliament would harm its relationship with regulated firms and damage its effectiveness and efficiency as regulator to the detriment of public interest.

The public interest in disclosure

40. However, it is also in the public interest that as much information as possible about regulated firms is available to consumers to enable them to make informed decisions about their dealings with such firms. The complainant also stated that one of the FSA's objectives as regulator is to:

'help people gain the knowledge, aptitude and skills they need to become informed consumers so they can manage their financial affairs more effectively'

Publishing the information in question would assist customers who may have dealings with the firms involved and so is in the public interest.

41. Disclosing the information withheld under section 43 would assist potential customers for equity release to know the areas where information and advice provided by regulated firms and advisers had been inadequate or misleading. This would assist them in making informed decisions about selecting firms or products. .
42. Whilst the firms named as subsequently invested could suffer bad publicity the complainant argues that knowledge that their names could be made public would encourage the firms to meet the required standards and treat its customers well. It is clearly in the public interest that firms meet the required standards. If publication of the firms' names and the opinions and analysis of the FSA in investigating them could realise this then there is a strong public interest in disclosing the information. The Commissioner's view is that disclosure of the information withheld under section 43 would assist the public understand of the role of the FSA and encourage firms to remedy problems quickly in the interests of its customers.

43. The Commissioner has taken into account the arguments provided by both parties for and against maintaining the exemptions. The Commissioner has also considered the strong public interest argument in enhancing transparency in the financial services industry which would improve the public's confidence in it. Disclosure of the information withheld under section 43 would provide to the public the names of firms mystery shopped, those further investigated and the opinions and analysis of the FSA following the investigation. The Commissioner considers that it is in the public interest to disclose information which promotes transparency in the financial services industry and which could encourage firms to take proactive measure to ensure better customer service.
44. The Commissioner has found that the questionnaires and client files are exempt in their entirety under section 44, therefore, disclosure of the remaining information under section 43 provides only a limited context to the investigation and the FSA's findings. Having reviewed this information the Commissioner finds that the information contained in the covering letter, index, summary of findings and suitability document withheld under section 43 does provide enough context to enhance the public understanding of the context in which both the mystery shopping exercise and further investigation were conducted and the results of both.
45. Taking into account all of the issues the Commissioner finds that section 43 is engaged but the public interest in disclosing the information covered by section 43 outweighs the public interest in maintaining the exemption.

Section 40 'Personal Information'

46. Section 40(2) provides that information is exempt if the information is the personal data of someone other than the applicant, 'third party data', and disclosure of the information would breach any of the data protection principles. The term 'personal data' refers to information about a living individual from which that individual can be identified.
47. Section 40(2) has been applied to the names of clients and personal advisors contained within the withheld information. The Commissioner has found that section 44 is engaged, apart from to the names of the firms mystery shopped, therefore the Commissioner has only considered the application of section 40 to the names of advisors contained within the remaining information.
48. In order for the Commissioner to reach a decision as to whether section 40 has been applied correctly the Commissioner must first consider if the information is personal data and then decide if disclosure would breach any of the data protection principles.
49. The information withheld under section 40 is the name of advisors. The Commissioner is therefore satisfied that the information withheld by virtue of section 40 is personal data. The Commissioner must therefore decide if disclosure of the information would breach any of the data protection principles. The first data protection principle requires that personal data be processed fairly and lawfully. When considering compliance with the First Data Protection

Principle it is necessary to consider what the legitimate expectations of the data subject would be and if disclosure would cause them unnecessary or unwarranted distress.

50. The Commissioner recognises that information which relates to job functions, grades or decision made whilst acting in a professional capacity would normally be disclosed. However the disclosure of the advisors' names would reveal information about their conduct as relates to an investigation by the regulatory authority and notes that the advisor would not expect their personal data to be disclosed in this context.
51. The Commissioner accepts that where an advisor has taken part in an investigation or undergone investigation by the FSA he or she would not expect that their names would be made public. Therefore to release the names of the advisors in this context would contravene the fairness element of the first data protection principle.
51. The Commissioner therefore finds that section 40(2) is engaged and as section 40 is an absolute exemption there is no need to consider the public interest test.

The Decision

52. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the Act:
 - i. The application of section 44 to some of the information held
 - ii. The application of section 40 to the names of advisors
53. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - i. The application of section 43.
 - ii. The application of section 44 to the names of the firms selected for mystery shopping by the FSA.

Steps Required

54. The Commissioner requires the public authority to take the following step to ensure compliance with the Act:
 - i. Disclose the names of the firms selected by the FSA for mystery shopping.
 - ii. Disclose the names of the firms further investigated
 - iii. Disclose the information withheld under section 43 in the: Covering letter; Index of Report; Summary of findings; and Suitability, for each of the firms further investigated, redacted of the names of advisors

55. The public authority must take the step required by this notice within 35 calendar days of the date of this notice.

Failure to comply

56. Failure to comply with the step described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

57. 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 16th day of August 2007

Signed

Steve Wood
Assistant Commissioner

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

Legal Annex

General Right of Access

Section 1(1) provides that -

“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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Commercial interests

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“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).”

Section 43(3) provides that –

“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

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

Section 44(2) provides that –

“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).”