

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 4 September 2007**

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

### Summary

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The complainant sought information from the Financial Services Authority ("FSA") that was generated by and/or considered during the FSA investigation of his complaint against HSBC Investment Bank plc. The FSA refused to disclose certain information relying on section 44 of the Freedom of Information Act 2000 citing section 348 of the Financial Services and Markets Act 2000 ("FSMA") as the relevant statutory bar. The Commissioner, after investigation and upon considering the relevant documents, finds that the FSA were correct in their application of the exemption.

### The Commissioner's Role

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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

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2. By way of a letter dated 26 March 2005 the complainant, referring to the Act, sought from the FSA "all the papers on file" concerning his complaint against the HSBC plc.
3. In a letter dated 22 April 2005 the FSA informed the complainant that they held information of the type requested but that some of it would not be communicated to him due to the exemption in section 43 (commercial interests) of the Act. The FSA agreed to the complainant's request, made in a letter dated 7 September

2005, to review its decision.

4. In a letter dated 4 May 2005 the FSA informed the complainant of the outcome of the review. It now sought to rely on section 44 of the Act (when read together with section 348 of the FSMA) to exclude certain information and that all other information would be communicated to the complainant. No reference was made by the FSA to section 43 in this letter, though they would do so in later correspondence with the complainant.
5. In a letter dated the 6 September 2005 the complainant asked the FSA to review its use of section 44 of the Act. The FSA complied with the request and informed the complainant of its outcome in a letter dated 28 October 2005. The outcome of the review being that the FSA maintained its reliance on section 44 of the Act. The FSA also explained that it no longer sought to rely on section 43 of the Act. Any information that had initially been withheld exclusively by reliance on section 43 was therefore now communicated to the complainant.

## **The Investigation**

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### **Scope of the case**

6. On 30 November 2005 the complainant wrote to the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether or not the FSA reliance on section 44 was lawful.

### **Chronology of the case**

7. The Commissioner entered into correspondence with the FSA regarding its reliance on section 44 of the act. Under cover of a FSA letter dated 2 May 2007 a copy of the non-disclosed information was provided to the Commissioner.

### **Findings of the case**

8. The complainant was one of the beneficiaries of a family trust established in 1972.
9. By way of a letter dated 30 November 1999 the complainant lodged a complaint with a predecessor of the FSA, the Securities and Futures Agency Limited ("SFAL") against HSBC Holdings plc regarding its (or its subsidiaries) management of the "family trust".
10. By operation of the FSMA and consequential statutory instruments the FSA was created and acquired legal responsibility for Mr Connolly's complaint against HSBC Holdings plc.

- 11 On conclusion of the investigation the FSA wrote to the complainant, in a letter dated 23 August 2000. It explained that while it could not reveal the details of the investigation it would not be taking any further action against HSBC.

## Analysis

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

## Procedural Breaches

13. The Commissioner notes that the request for information was made on 26 March 2005 and the relevant refusal (with the FSA relying on section 44 of the act) was on 4 May 2005. Therefore, the FSA failed to issue a refusal notice showing the exemption relied upon within the twenty working days as proscribed by section 10 and is accordingly in breach of section 17(1) of the Act. Since the refusal notice did not make reference to section 44 of the act i.e. the exemption relied upon, then the FSA is also in breach of section 17 (1) (b) and (c)

## Section 44 – Prohibitions on Disclosure

14. Section 44 of the Act provides that information is exempt from disclosure if the disclosure by the public authority is prohibited under any enactment. The FSA maintains that the prohibition engaged is section 348 of the FSMA.
15. Section 348 of the FSMA provides that confidential information must not be disclosed by the FSA without the consent of the person who supplied it and the consent of the person (if such exists) to whom the information relates. 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.
16. The Commissioner first set out to establish if, for the purposes of section 348 of the FSMA, the information is confidential information. Confidential information as defined by section 348 must have been obtained 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.
17. In its letter dated 6 March 2007 to the ICO, the FSA state that information withheld under section 44 consisted of documents which were either sourced

from the HSBC or internally generated documents by the FSA which described repeated or summarised information received from HSBC.

- 18 After analysis of the relevant documents, disclosed by the FSA to the ICO, it is apparent to the Commissioner that they were either received by the FSA from the HSBC or the information they contained in them was sourced from the HSBC.
- 19 Section 348 (1) states that confidential information must not be disclosed without the consent of the person from whom the information was obtained from and if different the person to whom the information relates. The FSA have approached HSBC to ascertain whether or not they would consent to disclosing the information. HSBC declined to give their consent.
- 20 The Commissioner therefore finds that the information is covered by section 348 of the FSMA and that section 44 of the Act is engaged where applied.

### **Public Interest Test**

21. Section 44 is an absolute exemption and therefore there is no requirement to consider the public interest test.

### **The Decision**

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- 22 The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that section 44 was correctly applied, however, the timing and construction of the refusal notice was in breach of sections 17(1), 17(1)(b) and 17(1)(c).

### **Steps Required**

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23. The Commissioner requires no steps to be taken.

## Right of Appeal

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24. 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](mailto: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 4th day of September 2007**

**Signed .....**

**Marie Anderson  
Assistant Commissioner**

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

## Legal Annex

### Freedom of Information Act 2000

Section 10 (1) provides-

Subject to subsections (2) and (3), a public authority must with comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

Section 17 (1) provides-

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of PartII relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

Section 44 (1) (a) provides-

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,

### Financial Services and Markets Act 2000

Section 348(1) provides-

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.

Section 348 (2) provides-

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 ...