

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 17 September 2007**

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

### Summary

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The complainant requested from the Financial Services Authority (the "FSA") a copy of a 1997 report concerning the Personal Investment Authority and Colonial Mutual. The FSA initially withheld the information on the basis of the exemption in section 44 of the Act but, subsequent to its internal review, also chose to rely on section 41. As a result of further enquiries, the Commissioner considers that section 41 applies to all the information requested. However, as the exemption was not used in the original refusal, the authority is found to be in breach of section 17. There are no steps required.

### The Commissioner's Role

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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

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2. On 17 September 2004 the complainant made the following request to the FSA: "I wish to acquire a copy of (The Deloitte and Touche Investigation, 1997) into the Personal Investment Authority and Colonial Mutual Group (UK Holdings) Ltd" (the "Report").
3. The FSA issued a refusal notice on 24 January 2005, citing the exemption under section 44(1) of the Act on the basis that the Report constituted confidential information for the purpose of section 348 of the Financial Services and Markets Act 2000 (the "FSMA"), disclosure of which is prohibited. The FSA stated that

Deloitte and Touche, chartered accountants, (“Deloittes”) had withheld its consent to disclosure of the Report under section 348(1) of the FSMA.

4. The complainant requested an internal review on 7 April 2005 and the FSA in its internal review dated 4 July 2005 upheld the original refusal.
5. On 3 January 2006 the FSA sent a letter of clarification to the complainant in response to a letter from him. The FSA now stated that it was instead withholding the information under section 41 of the Act, since the terms of engagement between Deloittes and the Personal Investment Authority (predecessor to the FSA) (the “PIA”) included an express confidentiality provision. It stated that it no longer considered that the section 44 exemption applied.

## The Investigation

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### Scope of the case

6. On 10 February 2006 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 the following points:
  - the applicability to the Report of the exemptions in sections 41 and 44 of the Act
  - in particular, the complainant argued that the information contained in the Report was not confidential within the terms of section 348 of the FSMA
  - he contended that the information contained in the Report was in any event based on information provided by him and former colleagues.
7. The complainant also raised other issues, including allegations about the adequacy of the regulation of part of the financial services sector by predecessor organisations of the FSA. These issues are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### Chronology

8. The complainant made his request for information to the FSA on 17 September 2004, which was prior to the date the Act came into force. In correspondence dated March and April 2006 between the Information Commissioner’s Office and the FSA it was agreed that the complaint would be treated as if the request had been made on or after 1 January 2005.
9. On 5 June 2007 the Commissioner requested from the complainant copies of certain missing items of correspondence, including the FSA’s original refusal notice.
10. On 11 June 2007 the Commissioner wrote to the FSA to obtain further clarification of its response to the complainant’s request for information. The FSA was asked, inter alia, to respond to and clarify the following points:

- which exemptions the FSA were applying; ie section 41 or 44 of the FSA, or both
  - how each relevant exemption was engaged in relation to the information requested
  - the application of section 348 of the FSMA
  - the complainant's contention that the information on which the Report was based had been provided by him and his former colleagues and hence was not confidential.
11. The FSA responded to that letter on 26 June 2007, enclosing a copy of a document entitled "Report to the Personal Investment Authority and Colonial Life (UK) Limited" dated August 1997 and labelled "Draft". The FSA also stated that this was the only copy of the Report it held.

In its letter the FSA made the following points:

- it reiterated that in its original refusal to the complainant, and on internal review, the FSA had applied section 44 of the Act and section 348 of the FSMA. However it had subsequently reviewed its position and instead applied section 41 of the Act
- it now considered that, in addition to the requested information being exempt under section 41, it was also exempt under section 44. Furthermore the FSA now applied section 40 to a small amount of information contained in the Report
- the FSA explained its reasoning for applying each of the pieces of legislation it cited
- the FSA acknowledged that allegations made by the complainant and his former colleagues "are likely to have been one of the reasons why Colonial Mutual and the PIA commissioned the Report". It also stated that the Report contained "minor references" to the complainant and his colleagues and the information they had provided. However it asserted that the instructions to Deloitte and the content of the actual Report covered a wider range of issues and information.

## Findings of fact

12. The investigation established that in 1997 the PIA and the Board of Colonial Life (UK) Ltd instructed Deloitte to write a Report into aspects of the business of the Colonial Mutual Life Assurance Society ("Colonial Mutual") with particular reference to its compliance with rules and regulations imposed on it by the PIA and the Life Insurance and Unit Trust Regulatory Organisation ("LAUTRO"), both regulatory organizations which were predecessors to the FSA.
13. The letter dated 10 March 1997 between Deloitte, Colonial Life (UK) Ltd and the PIA, signed by the latter two parties on subsequent dates in that month, set out the terms of reference of the work to be undertaken and the terms of engagement between the parties. The letter contained an express term stating that "Our reports shall be private and confidential....You agree that you will not send copies of our report to any third party without our prior written consent".

14. The FSA has disclosed to the Commissioner a copy of a document entitled "Report to the Personal Investment Authority and Colonial Life (UK) Limited" dated August 1997 and labelled "Draft" as referred to above. The FSA has stated that this is the Report it withheld from the complainant and the Commissioner accepts that this is the case.
15. The complainant has provided the Commissioner with a copy of a document "The Whistle" dated November 1996, produced by an organisation named "Freedom to Care" and entitled "Colonial Mutual: A Failure of Self-Regulation". The document set out various issues regarding Colonial Mutual and alleged that it had been inadequately regulated. The complainant is named in the document, which also includes statements made by him. The complainant has stated and the FSA agrees that the PIA had received a copy of that document.
16. Part of the Report contains references to the complainant and his colleagues and to "The Whistle". However, having examined both documents, the Commissioner accepts as accurate the assertion by the FSA that the contents of the Report covered issues and information additional to information provided and allegations made by the complainant and his colleagues in "The Whistle".

## Analysis

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### Procedural matters

#### 17. Section 17 – refusal of request

Section 17(1)(b) of the Act provides that a public authority must state in its refusal notice the exemption on which it relies.

18. The FSA issued a refusal notice on 24 January 2005 in which it applied the exemption under section 44 of the Act to the requested information. The FSA upheld this position on internal review on 4 July 2005.

19. However, subsequent to the refusal notice and internal review, the FSA applied the section 41 exemption to the request. The FSA stated in further correspondence with the Commissioner that it also considered the section 40 exemption to apply to part of the information.

20. The Commissioner therefore considers that the FSA failed to comply with section 17(1)(b) in that it failed to specify its reliance on section 41 in the refusal notice.

### Exemptions

#### 21. Section 41 – Information provided in confidence

The Commissioner has considered the application of section 41 to the information requested. Section 41 provides that information is exempt if it was obtained by the public authority from any other person and the disclosure of the information to

the public would constitute a breach of confidence actionable by that or any other person. In order for the Commissioner to be satisfied that the exemption is engaged in respect of the information, he must establish that the information has the necessary quality of confidence.

22. Although the FSA had not applied this exemption either in its refusal notice or in its internal review, it did so in its letter of clarification to the complainant dated 3 January 2006. It cited in support the express confidentiality provision contained in the legally binding terms of engagement between Deloitte, Colonial Life (UK) Ltd and the PIA referred to in paragraph 13 above. The FSA also referred to the refusal by Deloitte to give its consent to disclosure. Deloitte had stated: "Should such information be disclosed by FSA, this would constitute an actionable breach of confidence".
23. In its communications with the Commissioner, the FSA explained how the confidential nature of the Report supported the express obligation of confidentiality. The Report was prepared amidst a background of controversy and covered commercially sensitive issues. The FSA also stated that in its view there would be insufficient justification for overriding the obligation of confidence owed to Deloitte. It considered that it would not have a good "public interest" defence against any claim for breach of confidence by Deloitte.
24. The Commissioner has considered whether there would be a good defence to an actionable breach of confidence, for example that of consumer protection. He takes the view that there is an insufficiently strong argument in favour of disclosure in the public interest in this instance. The Report is ten years old, concerns issues from even earlier dates and concerns a company which now trades under a different name as well as a predecessor regulator to the FSA. There are insufficient arguments in favour of overriding the express duty of confidentiality applicable to this Report and hence there would be an inadequate defence to an actionable breach of confidence.
25. The Commissioner has also considered whether the Report contains information of a merely trivial nature, which would not require protection from disclosure. He considers that the information contained in the Report, relating to commercially sensitive matters about a company and a regulator, is of sufficient gravity to go well beyond any suggestion of triviality.
26. The Commissioner has also considered whether or not the information contained in the Report is accessible by other means. Although the complainant had alleged that he and his colleagues had provided the basis of the information contained in the Report, as stated above at paragraph 16 above the Commissioner has concluded that the Report contains a wider range of information.
27. The Commissioner has previously considered the application of the section 41 exemption in his Decision Notice FS50094583, dated 5 July 2007. He has made reference to that Decision in his assessment of this case, but has also considered the particular facts of this case on its own merits. In the Commissioner's view there is compelling evidence to support the contention that the Report has the necessary quality of confidence:
  - the information contained in the Report is of a far from trivial nature

- the sensitive nature of the content of the Report
  - the terms of engagement referred to above
  - the covering letter to the Report, from Deloitte to the PIA and Colonial Mutual, again refers to the provision as to confidentiality: “Matters contained in the report should not be disclosed to any third party without our prior written consent...” and expressly states that the terms of engagement “form the basis of this report and should be read in conjunction with and form an integral part of this report”
  - the Report itself reiterates the obligation of confidentiality at page 33.
28. The Commissioner considers that section 41 applies to the whole Report and that there is therefore no need to consider the application of any further exemptions. Section 41 is an absolute exemption and where it is engaged there is no need to consider the public interest test.

#### **Section 44**

29. Both the complainant and the FSA have debated the applicability of section 44 of the Act to the information requested, and in particular the question of whether the consent of Deloitte was required under section 348 of the FSA. The Commissioner has considered these issues and has concluded that since section 41 applies to the whole of the Report, it is not necessary to consider the application of any exemptions other than section 41.

#### **The Decision**

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30. The Commissioner finds that whilst the FSA was correct in its application of section 41 of the Act, it did not do so until after the completion of the refusal notice and internal review processes. The public authority did not deal with the request for information in accordance with the Act in that it failed to identify section 41 in the refusal notice. This represents a breach of section 17(1)(b).
31. The Commissioner upholds the application by the FSA of section 41 of the Act.

#### **Steps Required**

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32. The Commissioner requires no steps to be taken.

## Right of Appeal

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33. 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 17<sup>th</sup> day of September 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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

## **Legal Annex**

### **The Freedom of Information Act 2000**

#### **Section 1 – general right of access to information held by public authorities**

- (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.

#### **Section 2 – effect of exemptions**

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either –

- (a) the provision confers absolute exemption, or
  - (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,
- section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### **Section 17 – refusal of request**

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II 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 40(2) – personal information**

Any information to which a request for information relates is also exempt information if –

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or second condition below is satisfied.

#### **Section 41(1) – information provided in confidence**

Information is exempt information if –

- (a) it was obtained by the public authority from any other person (including another public authority), and



- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

### **Section 44(1) – prohibitions on disclosure**

Information is exempt information if –

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

## **The Financial Services and Markets Act 2000**

### **Section 348**

(1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining information directly or indirectly from a primary recipient, without the consent of -

- (a) the person from whom the primary recipient obtained the information; and
- (b) if different, the person to whom it relates.

(2) In this part “confidential information” means information which –

- (a) relates to the business or other affairs of any person;
- (b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority....