

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 2nd January 2008

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

Summary

The complainant requested a copy of a draft report prepared by FIMBRA (Financial Intermediaries, Managers and Brokers Regulatory Association), a predecessor of the Financial Services Authority (FSA). The FSA withheld the draft report under sections 43 and 44 of the Act. The Commissioner investigated the application of these exemptions and found that FSA was correct to apply both of them.

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. On 7 March 2005 the complainant made a request to the Financial Services Authority (FSA) to provide:

"full details of actions taken against each individual building society who ignored the risk warnings issued by the Building Societies Commission on the marketing of equity release schemes to pensioners in the late 80's;

a copy of a report written by FIMBRA (Financial Intermediaries, Managers and Brokers Regulatory Association) in the early 90's on a named party, the West Bromwich Building Society (WBBS); and

confirmation that a named individual, previously with a firm of independent financial advisers, was eventually barred from being a director for seven years."

3. On 7 April 2005 FSA replied. In relation to the first item, it explained that the estimated cost of locating and retrieving the information would exceed the appropriate cost limit of £450 provided by the Freedom of Information and Data Protection (Appropriate limit and fees) Regulations 2004. In relation to the third item, it explained that it did not hold information of the type described. FSA also advised the complainant that the draft FIMBRA report, which it did hold, was being withheld under section 43 of the Act (prejudice to commercial interests) and that it would write to him again once it had completed the application of the public interest test.
4. On 28 April 2005 FSA, having considered the matter of the public interest, wrote to the complainant to confirm that, after full consideration, it was withholding the draft under section 43 and, additionally, section 44 of the Act (statutory prohibition on disclosure.) It explained that the draft report contained two types of information. The first type was information received by FIMBRA for the purposes of its investigation. This is referred to as "background" information. FSA explained that this information was exempt under section 44 of the Act, an absolute exemption. The second type was described as analysis, opinion and related material generated by FIMBRA- this is subsequently referred to in this Notice as "opinion" information. FSA explained that this type of information was exempt under section 43(2) of the Act and that the public interest in maintaining the exemption outweighed the public interest in disclosure. On 30 April 2005 the applicant asked for an internal review of the decision.
5. On 30 June 2005 FSA confirmed that the internal review had taken place and that the original decision had been upheld on the same grounds. In the course of the review FSA had consulted further with WBBS who consented to the release of the open statement made in the Court of Appeal on 13 November 1997. This document was released to the applicant on 30 June 2005.

The Investigation

Scope of the case

6. On 9 July 2005 the complainant contacted the Commissioner in order to appeal against the decision.

Chronology

7. On 5 October 2006 the Commissioner asked FSA to provide a copy of the information withheld from the complainant along with any other relevant correspondence. FSA provided the information on 11 October 2006. It consisted of a copy of the draft report, a copy of the statement made in open court, two

refusal letters, dated 7 April 2005 and 28 April 2005, and the applicant's original request dated 7 March 2005.

8. On 27 October 2006 the Commissioner sought clarification about the status of the draft report. He asked why the draft report had not been finalised and whether or not it would be possible to provide the complainant with a summary of it. He also asked if the passing of time had made the material less sensitive. FSA replied on 8 November 2006. It confirmed that the report had not been finalised and explained that it had originally been prepared in order for the Securities Investment Board (SIB) and the Investors Compensation Scheme (ICS) to carry out an investigation into certain allegations against WBBS. The draft report was subsequently leaked and WBBS took libel proceedings against FIMBRA. FIMBRA argued that it was a 'draft' document and, therefore, that it could not be libellous. FIMBRA stressed that the report had not been through any internal processes and had not been finalised. Following the libel action, no further work was undertaken to complete the report or to verify its content.
9. FSA explained that, in its view, it would not be possible to produce a meaningful summary of the report without disclosing information it considered exempt. Any summary would need to be so neutral that it would be of no interest to the complainant.
10. On 10 November 2006 the Commissioner made further enquiries to FSA. It replied on 27 November 2006. On 4 December 2006 the complainant wrote to the Commissioner providing a copy of the statement in open court to support his view that, because the draft report had been leaked previously, it was already in the public domain. He suggested that the report should be released in accordance with Section 180 of the Financial Services Act 1986 (the 1986 Act). This point had previously been raised in correspondence with FSA, who had replied to the effect that it did not consider the fact that the draft report was leaked meant that it was now in the public domain: rather that it had been disclosed in breach of the Financial Services Management Act 2000 (FSMA 2000).
11. On 23 February 2007 FSA wrote to the Commissioner making a further submission in relation to the withheld information. FSA explained that it had reviewed the application of section 44 and had extended it to the whole of the document. It put forward fresh arguments as to why section 44 should, in fact, apply to the whole of the report. FSA claimed that its section 17 refusal letter to the complainant had failed to reflect the fact that FIMBRA and the FSA were, at the material time, two different legal entities, each being a separate company formed under the Companies Acts (although FIMBRA was dissolved some years ago). FSA argued that it was incorrect of it to treat information generated internally by FIMBRA as if it were information generated internally by FSA/SIB. Its revised analysis was that the whole draft report, including FIMBRA's opinions, was received by FSA/SIB as a separate legal entity for the purpose of carrying out its functions under the 1986 Act. The Commissioner replied to FSA on 17 June 2007.
12. Meanwhile, the complainant had provided the Commissioner with further information in the form of press cuttings and selected correspondence suggesting

that there were further versions of the report. The Commissioner followed this up with the FSA in correspondence and met with officials in November 2007 to investigate this further development.

Findings of fact

13. There are in fact, two versions of the draft report. The report dated February 1994 is entitled "The Role of the West Bromwich Building Society in the sale of Home Income Plans – a Draft Interim Report" "First Draft Robert Guest February 1994". This report is annotated across the top right hand side with the words "27/3/95 produced and distributed at TCSSC by M. O'Brien MP". It is this copy that is the subject of the complainant's request. During the Commissioner's investigation into the complaint a later copy of the draft report, dated June 1994, came to light following further searches by the FSA. The Commissioner is satisfied as to the circumstances surrounding the discovery of this later version and accepts that it is not the version to which the complainant's original request related.
14. At the time this report was drafted (February 1994) FIMBRA (a Self-Regulating Organisation) was responsible for the regulation of Independent Financial Advisers (IFAs). FIMBRA was a separate entity from the Securities and Investment Board (SIB).
15. SIB was responsible for "recognising", then overseeing, the activities of the self-regulating organisations such as FIMBRA and regulatory policy in general under the Financial Services Act 1986 (the 1986 Act). In October 1997 SIB changed its name to the Financial Services Authority (FSA) and, in December 2001, the FSA became the single regulator for financial services when the Financial Services and Markets Act 2000 (FSMA) came into force and the 1986 Act was repealed. FSMA was established to coordinate and modernise the regulation of the UK financial services industry through a single set of functions and powers. FSA also took over the responsibilities of a number of other regulatory financial bodies including The Building Societies Commission (BSC).
16. The BSC was established by the Building Societies Act 1986. This Act gave wider powers than were available under earlier legislation to societies in the field of housing and personal banking services and established the BSC as the societies' regulator. One of the main functions of the BSC was the protection of depositors but the 1986 Act gave the BSC no power or responsibility for protecting the interests of borrowers. FSA took over BSC's responsibilities for the supervision and regulation of building societies.
17. FSA explained to the Commissioner that FIMBRA would have had no remit or power to investigate a Building Society unless it was a member of FIMBRA, which WBBS was not: such investigations would have previously been the responsibility of SIB. FIMBRA in the ordinary course of events would have submitted its investigation report to SIB, who would have considered what steps were required and would have liaised as necessary with the BSC. BSC would have then

- followed up any issues within its remit as it considered appropriate with the Building Society.
18. The purpose of the draft report (dated February 1994) was to inform a SIB investigation. In 1995 this report was leaked to Parliament and to the media when several newspapers revealed parts of the text in articles. The draft report was also discussed in the Minutes of Evidence taken before the Treasury and Civil Service Committee (T&CSC) on 27 March 1995.
 19. WBBS took libel proceedings against FIMBRA and the matter was settled on the basis of an apology: a statement in open court was subsequently issued in 1995. Following court action no further action was taken in respect of the draft report and it remains unverified and unsubstantiated. Events were overtaken by action in the High Court and the House of Lords by the Investors Compensation Scheme (ICS). Judgment was issued on 19 June 1997.
 20. FSA has advised the Commissioner that a range of measures was put in place by WBBS to assist those people affected by the failed scheme and these measures were described in a note from the BSC to the All Party Parliamentary Group on Insurance and Financial Services, dated 28 June 1994.
 21. FSA also advised the Commissioner that, so far as it is aware, WBBS has never seen or been given a copy of any of the reports in question. WBBS only became aware of the existence of the reports as a result of the T&CSC and media coverage. FSA provided the Commissioner with correspondence between itself and the WBBS to confirm what the latter's knowledge was of the draft report. The reports themselves show that no member of WBBS's staff was invited to comment on their contents.
 22. Home Income plans or equity release schemes were marketed in the 1980s to assist the elderly in releasing equity tied up in their properties, which would then be invested on the stock market with the resulting returns enabling them to have a better quality of life in their later years. However, by the end of the decade, mortgage interest rates had soared, the stock market had slumped resulting in many pensioners being left with soaring debts and little means of paying them. However, as a result of various measures put in place by Building Societies, no borrowers with an equity release mortgage had their homes repossessed.
 23. HIPS (97) is a support group for victims of failed home income plans set up and run by the complainant.

Analysis

24. The Commissioner has considered FSA's use of the exemptions in sections 43 and 44 of the Act in dealing with this request. The full text of these exemptions is contained in the legal annex.

Exemption

Section 44

25. The section 44 (1) exemption applied by FSA relates to information that is prohibited from disclosure by or under another enactment. Section 44 is absolute and therefore not subject to the public interest test. The relevant enactment is section 348 of the Financial Services Management Act 2000 (FSMA 2000).
26. **Section 348:** Restrictions on disclosure of confidential information by Authority etc.
- (1) 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.
- (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, the competent authority for the purposes of Part VI or the Secretary of State under any provision made by or under this Act; and
 - (c) is not prevented from being confidential information by subsection (4).
- (3) It is immaterial for the purposes of subsection (2) whether or not the information was received—
- (a) by virtue of a requirement to provide it imposed by or under this Act;
 - (b) for other purposes as well as purposes mentioned in that subsection.
- (4) Information is not confidential information if—
- (a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or
 - (b) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.
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27. Section 348 is applied by section 349 of FSMA 2000 and Part V of the FSMA 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001 No2188) to information obtained by the FSA’s predecessor organisations including FIMBRA.
28. Section 348 prohibits the disclosure of ‘confidential information’ obtained by the FSA (or its predecessors) for the discharge of the functions of the FSA without the consent of the party who supplied the information or the party 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 that it is not possible to ascertain to whom the information relates. In this case consent for disclosure would need to have been obtained from WBBS. WBBS was approached by FSA and refused to allow disclosure of the information in question.

29. 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. Although extracts purporting to be from the draft report were leaked to the media and provided to Parliament in relation to the T&CSC in 1995, this does not mean that the information has been made available to the wider public.
30. FSA has explained that the leak of the draft report by FIMBRA was an unauthorised disclosure of the information and, consequently, the information has not been made public in the circumstances envisaged by section 348(4). The draft report therefore remains confidential information despite the fact that it was disclosed and formed the basis of a libel action in the High Court. The Commissioner therefore takes the view that none of the information requested has been made available to the public and, additionally, where section 44 has been applied, it is possible to identify the person, or persons, to whom the information relates.
31. The Commissioner considered whether the fact that parts of the report were leaked means that the information is in the public domain. While he has seen, and so acknowledges the existence of, newspaper articles citing parts of the draft report he accepts FSA's view that the leak of the material was an unauthorised disclosure. He therefore takes the view that the document is not in the public domain in any real sense: if it was the complainant could get a copy of it or the FSA would be able to cite section 21.
32. The Commissioner is satisfied that the factual background information was confidential information obtained by a predecessor of the FSA for the purpose of discharging its statutory functions as the regulator of the financial services industry. The Commissioner therefore finds that the information is covered by section 348 FSMA 2000 and that section 44 of the Act is engaged where applied to the information described as "background" information. Section 44 is an absolute exemption and therefore there is no requirement to consider the public interest test.
33. The Commissioner informed FSA by a letter dated 17 June 2007 that he did not share its view of the likely applicability of section 44 to the whole document. While he agreed that factual background information obtained by FIMBRA in the course of its investigations (and then passed to the FSA) should, in all likelihood, be covered by the statutory prohibition on disclosure, he was not persuaded that the "opinion" information of FIMBRA fell to be covered by s348 FSMA 2000. In his view this information represented the self-generated opinion of one regulator

which had been passed to a second regulator who had taken on the regulatory functions of the first. On that basis he has looked at this information in respect of the exemptions previously cited.

Exemption

Section 43

Section 43(2) – Prejudice to commercial interests

34. Section 43 provides that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Section 43(2) is a qualified exemption and therefore, if the Commissioner finds that the exemption is engaged he must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
35. FSA has applied this exemption to the remainder of the information in the draft report, information described as the “opinion” information. The “opinion” information is not confidential and is therefore not covered by the absolute exemption in section 44.
36. FSA explained that it had contacted WBBS in order to see whether or not it might be prepared to agree to the release of a summary of the draft report. WBBS expressed concerns that the release of the report, albeit in a draft, unverified form, would still be capable of seriously damaging its commercial interests.
37. WBBS’s views on this were that release would seriously damage its commercial interests and generate negative publicity in that it may: harm the continuing relationship between the Society and existing equity release borrowers; affect its ability to win new business; affect consumer confidence in the Society; expose the Society to the risk of further claims; and undermine confidence in the Society with potential adverse consequences for shareholding members.
38. FSA argues that, as the draft report was the subject of defamation proceedings between WBBS and FIMBRA, disclosure of the “opinion” information under the Act could expose FSA to the risk of legal action, which is against its commercial interests. In the Information Tribunal decision in the case of Bellamy (EA2005/2003) it was emphasised that in weighing the public interest in favour of disclosure, account can only be taken of the public interest inherent in the exemption claimed. Therefore in this case the Commissioner can only take into account the public interest in not damaging the commercial interests of WBBS, rather than any commercial damage to the interests of FSA.
39. In coming to a view on this matter the Commissioner has considered the Tribunal Decision EA/2005/005 ‘John Connor Press Associates vs. the Information Commissioner’. The Tribunal interpreted the exemption at section 43 to mean that the chance of prejudice must be more than a hypothetical or remote possibility;

there must be a real or significant risk. This was further expanded in the Tribunal decisions in the cases of Hogan vs. the Information Commissioner EA/2005/0026 and Bexley vs. the Information Commissioner EA/2006/0060. 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”.

40. In determining if the risk of prejudice fits the criteria above the Commissioner has taken into account the type of harm described in paragraph 37 and considers that there is a real risk of such harm being caused. He is therefore satisfied that the exemption in section 43 of the Act is engaged in respect of the “opinion” information.

Public interest test

41. 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 FSA has put forward the following arguments:
- FSA recognises that there is a public interest in increasing the amount of information available to consumers on matters of legitimate concern (such as the sale of home income plans). However, it points out that the draft report was never finalised nor its contents verified. Furthermore the body forming the subject of the report, WBBS, was not given the opportunity to comment before the limited circulation of the report that did take place.
 - FSA says that as a draft report, its status is not authoritative. Its status would be further reduced if disclosed as it would need to be heavily redacted in order to exclude the information covered by the exemption in section 44 of the Act. In addition, a detailed description of the Society’s product can be obtained from the High Court’s decision given in public in litigation between the Society and the Investors Compensation Scheme.

The complainant’s view

42. The complainant raised the fact that the draft report had been leaked to Parliament and the media in 1995. He said that the prohibition on disclosure in section 170 of the Financial Services Act 1986 (now section 348(1) FSMA 2000), preventing FSA from releasing confidential information, no longer applied as the information had found its way into the public domain. He said that making the report available to MPs and the media had created a “gateway” under section 180 FSA 1986 (now section 348(4) FSMA 2000).
43. The complainant also said that the internal review by FSA came down heavily in support of WBBS without giving consideration to the behaviour meted out to elderly pensioners. He made reference to the High Court case against WBBS and the fact that it had failed to stop the very elderly from still having mortgages

with ever increasing debts. He alleged that WBBS ignored the risk warnings issued by their regulator, the Building Societies Commission, when it had warned that it should not be assumed that house prices would continue to rise.

The Commissioner's view

44. There are strong public interest arguments in allowing members of the public access to information that would give them an opportunity to seek compensation if they were mis-sold mortgage products, and the Commissioner has every sympathy with those who now find themselves in distress. Pensions, and the ability of people to provide for themselves in their old age, are topics of public debate and concern. There is a strong need for openness about how such companies behave and the public needs to have confidence in these institutions and to know that, when things go wrong, there are remedies available.
45. The Commissioner has taken into account the fact that the report was written some years ago about events that were alleged to have taken place in the late 80's. He has considered the veracity of the draft and whether the impact of the report would lessen with the passage of time. However, the fact remains that individuals continue to suffer as a result of these events and he takes the view that it would not be fair or reasonable to encourage people to bring a case or to take action on the basis of the release of unverified information which was the subject of a successful libel action and which, in the event, was never acted upon.
46. The Commissioner does not consider, in all the circumstances of this particular case that publication of the report now would be in the public interest or in the interest of those affected investors. For these reasons the Commissioner finds that section 43 is engaged and that, in all the circumstances of this particular case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the "opinion" information.

The Decision

47. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

48. The Commissioner requires no steps to be taken.

Right of Appeal

49. 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 2nd day of January 2008

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Commercial interests.

Section 43(1) provides that –

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).”

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.”