

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 November 2010

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 (the 'FSA') should provide him with the names and numbers of the individuals who work in the Enforcement and Investigation teams within the organisation. The FSA refused the request under section 40(2) of the Freedom of Information Act 2000. It explained that it routinely only released the names of its Heads of Department and above. During the course of the investigation, the FSA disclosed the names of the managers and the number of investigators. This Decision Notice therefore focuses on the issue of the names of the investigators. The Commissioner finds that the FSA was correct to apply section 40(2) to that part of the request concerning the names of the investigators.

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 31 July 2009 the complainant requested the following information:

'Please provide a list of those in the enforcement / investigation team at the Financial Services Authority. Following a series of press releases about high profile hires to the team, in order to move towards a more active American SEC model, we wish to know the names and the numbers of employees in the enforcement / investigation team.'

3. The complainant provided the following arguments in support of his request:

- It is usual practice in public bodies to list public employees on a website.
- There is no precedent under the Data Protection Act 1998 (the 'DPA') which establishes that names constitute personal data, or even sensitive personal data.
- The published guidance of the Information Commissioner's Office confirms that disclosure would normally be expected regarding job functions, grades or decisions.
- It is highly unlikely that the Financial Services Authority (the 'FSA') could make a convincing argument to claim that in this instance it had a duty of confidence to its employees.

4. On 20 August 2009 the FSA responded to the above request. It confirmed the number of permanent employees in the Enforcement / Investigation team in the Enforcement Division, not including temporary and contract staff or secondees. These were the staff most actively involved in investigations. It also gave the number of staff in the Financial Crime Division and in the Markets Division who also carried out investigatory work.

5. The FSA provided a link to a website which gave all the names of employees at Head of Department level or above. It explained that it was not the policy of the FSA to disclose details of staff below Head of Department level.

6. The FSA considered that the names of the investigative staff in the Enforcement Division taken with the fact that they were part of the investigation team, constituted the personal data of those individuals. The FSA noted that personal data related to an individual in his professional capacity as well as his private affairs.

7. The FSA therefore claimed the exemption at section 40(2) by virtue of section 40(3)(a)(i) of the Freedom of Information Act 2000 (the 'Act'). It argued that the exemption applied because the information requested constituted personal data and its disclosure would breach the first principle of the DPA which states that information must be processed fairly and lawfully.
8. The FSA argued that the individuals have not given their consent for their personal details to be made public and that the release of the requested information may be detrimental to them.
9. On 2 September 2009 the complainant requested an internal review. He argued that there was a serious public interest involved in the disclosure of this information.
10. The complainant explained that he had been given anonymous information which suggested that the FSA's Enforcement team (largely the Markets and Investment Banking Division) is staffed by many people with former convictions or disciplinary records within the banks they seek to regulate. He wanted to establish whether this was the case.
11. On 5 October 2009, the FSA performed the requested review of its refusal. The conclusion of this review was that the FSA was correct to rely upon section 40(2) of the Act. The FSA provided further arguments to support its refusal to disclose the requested information.

The Investigation

Scope of the case

12. On 3 November 2009 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 public interest in examining the work of the FSA as a regulator of banks. He did not accept the arguments that the information should be withheld on the grounds that it was personal information.
13. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:

- The FSA agreed to disclose the names of its employees who worked at the level of manager in the Enforcement, Financial Crime and Intelligence Division. The FSA accepted the Commissioner's preliminary view that such senior individuals within the organisation had a high level of accountability and responsibility which warranted the disclosure of their names.
 - The FSA agreed to disclose the numbers of staff carrying out investigations in the Enforcement, Financial Crime and Intelligence Division and Market Monitoring, but not their names.
 - The complainant confirmed that he was not interested in the names of the support staff and administrators who worked in the Enforcement or Investigation teams at the FSA and so withdrew this element of his complaint.
14. However, the complainant did not accept that the names of the investigators should be withheld under section 40(2) and this is the now the scope of this case.

Chronology

15. On 15 January 2010 the Commissioner wrote to the FSA and requested that it should either provide the complainant with all the names he required or send the Information Commissioner's Office (the 'ICO') an organisation chart showing the position of the relevant individuals and their job descriptions if it wished to maintain its reliance on the section 40(2) exemption. He also asked for the policy of the FSA regarding its disclosure of information about staff and confirmation as to whether it had asked the individuals concerned if they would be willing to consent to the disclosure of their names.
16. On 8 February 2010 the FSA wrote to the Commissioner. It explained that it had interpreted the request as requiring the names of all staff who work in the Enforcement / Investigations Teams and all staff employed in its Financial Crime Department and its Markets Division. This included staff who did not carry out investigations and included support staff (mainly administrators). The FSA asked for clarification regarding the Commissioner's interpretation of the request. The FSA provided further arguments as to why it did not consider that it should release the names of its staff.
17. On 22 February 2010 the Commissioner confirmed with the complainant and the FSA that the request concerned the names of investigators at the FSA plus the staff who conduct enquiries on their behalf. It did not include the support staff and administrators.

18. On 10 March 2010 the FSA sent the Commissioner an organisation chart and the requested job descriptions. It explained that it did not have a written policy which stated that it did not publicise staff names below the level of Head of Department but that in practice this was consistently demonstrated. The FSA explained it had not sought the consent of the individuals concerned. It provided further arguments as to why the names should not be disclosed.
19. On 18 March 2010 the Commissioner asked the FSA to provide further information regarding to what extent the investigators and managers jobs could be described as 'public facing'. The Commissioner also asked the FSA to explain to what extent these jobs involved a significant level of personal judgement and responsibility.
20. On 14 April 2010 the Commissioner asked the FSA to clarify some outstanding points with regard to the roles of the investigators. The FSA was also asked to explain what mechanisms were in place to ensure that the investigations which were conducted were subject to scrutiny and a degree of quality control.
21. On 28 April 2010 the FSA provided the Commissioner with detail of the Enforcement process and information regarding the scrutiny and oversight of investigations conducted by the FSA investigators.
22. On 20 May 2010 the Commissioner wrote to the FSA and requested that it should provide the complainant with the names of the individuals at the level of 'manager' grade, but not the names of the investigators at associate level (senior associate and associate) or the names of the technical specialists. This applied to associate and technical staff in the Enforcement Division and in the Financial Crime and Intelligence Department and Markets Division. The FSA was asked to disclose the number of the investigators in these Departments.
23. On 6 July 2010 the FSA confirmed that it was prepared to release the names of the managers who worked in the Enforcement, Financial Crime and Intelligence Division. It was also prepared to release the numbers of staff (not including support or administrative staff) carrying out investigations working in the Enforcement, Financial Crime and Intelligence Division and Market Monitoring.
24. On 21 July 2010 the FSA rang the Commissioner to explain that the numbers of managers in post had changed since the information was requested. The FSA wanted to know if the complainant wanted the names of the managers as they existed at the time of the request or the names of existing managers.

25. The Commissioner must consider the date of the request when making a decision in respect of a complaint made to him under section 50(1) of the Act. However, in an attempt to resolve the complaint informally, on 23 July 2010 the Commissioner wrote to the complainant and explained to him what information the FSA had been asked to provide. The Commissioner asked the complainant whether he wanted the names of the managers in post at the time of the request or at the current time.
26. On 26 August 2010 the complainant indicated that he did not accept the Commissioner's preliminary conclusions.
27. On 3 September 2010 the Commissioner confirmed to the FSA that the complainant required a Decision Notice and asked the FSA to proceed to providing the information regarding the names of the managers and the numbers of investigations staff to the complainant.
28. On 6 September 2010 the Commissioner confirmed to the complainant that the names and numbers to be provided were those in post at the time of the request.

Analysis

Exemptions

Section 40(2)

29. The full text of section 40(2) is available in the Legal Annex at the end of this Notice.
30. The FSA has argued that the names of the investigators are exempt from disclosure under Section 40(2) of the Act.
31. Section 40(2) of the Act specifies that the personal information of a third party must not be disclosed if to do so would contravene any of the data protection principles. The first principle of the Data Protection Act 1998 (the 'DPA') states that personal data must be processed fairly and lawfully.
32. 'Personal data' is defined under section 1(1) of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller.

33. The names of the investigators in the Enforcement / Investigations teams are clearly personal data as they relate to identifiable living individuals.
34. In considering whether disclosure of the names of the investigators would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
 - Whether the requested information is sensitive personal data
 - The consequences of disclosure
 - The data subject's reasonable expectations of what would happen to their personal data
 - The balance between the rights and freedoms of the data subject and the legitimate interests of the public

Sensitive personal data

35. Any consideration of fairness must first determine whether the requested information is defined as sensitive under the DPA. Section 2 of the DPA defines sensitive personal data as information which relates to:
 - (a) racial or ethnic origin
 - (b) political opinions
 - (c) religious beliefs
 - (d) trade union membership
 - (e) physical or mental health
 - (f) sexual life
 - (g) criminal offences, sentences, proceedings or allegations.
36. The names of the investigators do not fall into any of these categories. The Commissioner would therefore not consider them to be sensitive personal data.

Consequences of disclosure

37. The FSA has explained that the complainant has suggested that there are individuals employed by the FSA who have former convictions and disciplinary records within the banks they seek to regulate. The FSA is therefore concerned that disclosure of the information would result in unwarranted interference in the lives of the individuals concerned and argues that the rights of these individuals must be protected to avoid distress. It has not provided any evidence to support this argument.

38. Although the Act is applicant-blind, the Commissioner has borne in mind these arguments whilst making his assessment.

Reasonable Expectations

39. The FSA has argued that the individuals concerned have not given their consent for their personal details to be made public and that the release of the requested information may be detrimental to them. They may have personal reasons for wanting this information withheld.
40. The Commissioner accepts that consent has not been granted for the disclosure of individuals' names; however the FSA has not provided any evidence to suggest that release of such information would cause unwarranted damage or distress to any individual.
41. The FSA has explained that these individuals do give out business cards and issue letters and emails containing their details in the course of their activities. It is therefore apparent that their identity is not withheld to protect them in their investigatory roles: they are not working anonymously and are known to the firms they deal with.
42. It could also be argued that in view of the fact that the individuals come into contact with external parties as part of their job, it would be reasonable for the individual to expect public awareness of this role. The FSA has not suggested that this type of disclosure has caused the investigators any damage or distress.
43. However the FSA has argued that the individuals concerned would have an expectation that their names would remain confidential. The provision of a name during the course of an investigation does not constitute disclosure to the world at large and simply allows those concerned to make contact with appropriate individuals. The FSA does not believe there is justification for all staff names to be further disseminated.
44. In addition, the amount of direct contact between those involved in an investigation and the firm under investigation will vary depending on the scale and complexity of a case and the part the FSA investigator plays in that investigation.
45. The FSA has also argued that it is not fair that names should be disclosed if this would lead to the identification of people with unusual names.

46. The Commissioner does not necessarily accept that the release of unusual names would be unfair. However, the Commissioner considers that it may be unfair to release names into the public domain where the individuals had no expectation that their identities would be revealed because their jobs were not sufficiently senior or sufficiently public facing.
47. The Commissioner has produced guidance to assist public authorities in determining when names of individuals should be released:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/whenshouldnamesbedisclosed.pdf

48. When deciding whether it would be fair to identify an individual, in addition to the above considerations, this guidance states that the following factors should be considered:

- the seniority of the role
- whether the role is public facing
- whether the position involves a significant level of personal judgement and individual responsibility

49. The Information Tribunal in the case of *DWP v IC (EA/2006/0040)* found that it was not necessary to release the name of a junior civil servant who had signed off a decision because he was "acting largely on behalf of others" and was not "personally responsible". However the guidance suggests that this does not necessarily mean that the names of more junior staff should always be withheld. The context is important.

The seniority of the role

50. In the Enforcement Department ultimate responsibility for the conduct of the investigation and significant decisions about an investigation (or project) are made by the Project Sponsor who will be at the grade of 'Head of Department'. This individual will be the decision maker on material decisions, for example whether to close an investigation or change its scope. In some cases the decisions made at this level will be taken in consultation with the Director of Enforcement.
51. The investigators who work in the Enforcement Division are capable of making some decisions and may work unsupervised or with minimal supervision, but they do not take responsibility for the investigation. They provide technical advice and undertake complex tasks, projects, research and/or investigations. Managers are responsible for the

conduct and day to day running of an investigation and Department Heads take ultimate responsibility.

52. The investigators (senior associates, associates and technical specialists) in the Financial Crime and Intelligence Department and Markets Monitoring Division usually carry out preliminary enquiries prior to referral of a case to the Enforcement Division for formal investigation. They may be involved in the Enforcement investigation providing expertise, obtaining information or assisting with analysis work.
53. However, these roles in these departments are more likely to be involved in investigations in a supporting capacity and will have neither extensive contact with the subjects of an investigation, nor responsibility for any of the more material decisions made in the course of an investigation.
54. The Commissioner is therefore satisfied that the investigators in the Enforcement Team and in the Financial Crime and Intelligence Department and Markets Monitoring Division have some degree of autonomy but do not hold the senior roles within an investigation. They are not ultimately responsible for the outcome of investigations.

Public role

55. The Information Tribunal in the case of *The Corporate Officer of the House of Commons v IC and Norman Baker MP (EA/2006/0015 &0016)* stated that where individuals carry out public functions or spend public funds they must have a greater expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives.
56. The FSA has confirmed that to an extent the role of the investigator is considered to be "external facing", as many of the individuals liaise with members of the public on a regular basis. The complainant has argued that the role of the investigator is similar to the role of a low ranking police officer and that their names are in the public domain. It could therefore be argued that these individuals represent the FSA in their public roles and should be identified to the wider public.
57. However, disclosure of a name to an individual in another company does not constitute disclosure to the world at large. The Commissioner would not consider that such names are placed in the public domain when they are provided within the context of an investigation. In such circumstances names are provided by individuals in their professional roles; such identification is expected in the workplace.

58. The Commissioner also considers that an investigator at the FSA does not hold the same public role as a low ranking police officer. The two roles entail different levels of contact with the public. A police officer's role is to liaise with the public and to present the public face of the Police Force to all members of society. In contrast, an FSA investigator might work with individuals from companies under investigation but this is a relationship between professionals in a particular context.
59. In addition, the FSA could not be specific about the degree to which these roles would be 'public facing'. The investigators do come into contact with external parties but in some projects, particularly in the Financial Crime and Intelligence Department and Markets Monitoring, this contact may not be extensive. The FSA clarified that although investigators do interact with personnel in other companies, they are not expected to carry out a role as a spokesperson for, or as a representative of, the FSA to a wider public.
60. The job descriptions would suggest that the senior associates, associates and technical specialists do not hold public roles. The individuals are conducting investigations and undertaking a responsible job which requires judgement and understanding but it would appear that they are technical and based at the project level. The Commissioner is satisfied that although they may have contact with external stakeholders they do not represent the public face of the FSA.

Accountability

61. The whole investigation process is intended to be fair and objective and the FSA has described the level of scrutiny which ensures that investigations are objective and subject to a standard of quality control.
62. A legal review is also carried out at the end of the investigation process by an enforcement lawyer operating independently of the investigation team. This review will ensure that any proposed FSA enforcement action is reasonable, lawful and justified by the evidence available.
63. In the event that Enforcement staff recommend formal disciplinary action in respect of a firm or individual, the decision regarding whether or not to take enforcement action and the issue of statutory notices is made by the Regulatory Decisions Committee (the 'RDC'). This is therefore a separate body appointed to and accountable to the FSA Board. It is advised by its own lawyers who are not part of the Enforcement and Financial Crime Division.

64. Following the issuing of a Decision Notice by the RDC, a firm or individual will have the right to refer their case to the Financial Services and Markets Tribunal. This is an independent Tribunal.
65. During an investigation, the subject has the opportunity to engage in full and frank dialogue with the FSA. Towards the end of an investigation the subject will be sent a preliminary investigation report and is invited to provide comments. Once the matter is referred to the RDC, the subject has further opportunity to submit representations. Likewise at the conclusion of an investigation, the subject attends a feedback meeting with two FSA Heads of Department.
66. The mechanisms in place at the FSA to ensure an investigation is fair and objective confirm that investigators are not ultimately accountable for their outcome.

Personal judgement and individual responsibility

67. In this case, it appears that the investigators are undertaking a responsible job which requires judgment, understanding and expertise. There is a strong argument that individuals who work in such responsible public facing roles should expect to be accountable for the decisions they make.
68. However, the FSA has argued that all the significant decisions in an investigation will take place at the Head of Department level and in some cases, in consultation with the Director of Enforcement. The FSA has explained the role of the Regulatory Decisions Committee and explained the mechanisms in place to ensure that an investigation is fair and open.
69. The investigators in the Enforcement Division are therefore not ultimately responsible for the outcome of investigations. They are also not accountable for the conduct of an investigation. The investigators in the Financial Crime and Markets Monitoring Division likewise do not have responsibility for any of the more material decisions made in the course of an investigation. In addition, in this division, the investigators may not have extensive contact with the subjects of an investigation.

The balance between the rights and freedoms of the data subject and the legitimate interests of the public

70. The public undoubtedly has a legitimate interest in knowing who conducts financial investigations on its behalf. It should be able to have confidence that the FSA conducts its affairs with integrity and be assured that the FSA is open and accountable.

71. The Commissioner considers that there is a legitimate interest in allowing the public to know who is responsible for dealing with financial issues on their behalf. Whilst the names of the individuals are of particular interest to the complainant, this information may also be said to be of wider public interest.
72. It could therefore be argued that the names of its investigators should be disclosed to promote such openness and accountability. Individuals who work in public facing roles should expect to be accountable for the decisions they make.
73. There is a public interest in being reassured that these individuals do not have former convictions and disciplinary records. Members of the public should be able to have confidence in the employees of the FSA.
74. However, the FSA has argued that staff employed by the FSA are subject to a rigorous range of employment and background checks before they are taken on. The FSA has explained that some staff will have undergone a Developed Vetting procedure which is conducted by the Ministry of Defence. This would suggest that the public should be reassured the employees of the FSA are individuals of integrity.
75. The FSA has also argued that providing the names of staff so that the complainant can perform further checks upon the individuals in question would not serve the public interest. The FSA has requested that in the public interest the complainant should provide it with any allegations he is aware of so that it might investigate them itself; however he has declined to do so.
76. The Commissioner considers that the employment checks performed by the FSA should provide some degree of reassurance to the public. He is also satisfied that the release of the names of the individuals at the levels of manager, Head of Department and above provides the accountability which is expected and meets the legitimate interests of the public. These are the senior employees of the FSA and these are the individuals who take responsibility for investigations and are accountable for their outcome.
77. The senior associates, associates and technical specialists who perform the investigations are not accountable for the conduct of an investigation and are not ultimately responsible for the outcome of the investigation. They are therefore not sufficiently senior to warrant disclosure of their names and have no expectation that this will take place. They may reveal their identities to the firms they investigate, but they do not represent the public face of the FSA to the wider public.

Conclusions

78. In view of the above arguments, the Commissioner does not consider that it would be fair to disclose the names of the investigators (senior associates, associates and technical specialists) to the complainant. These investigators have not given their consent for disclosure and they have no expectation that their names would be released. Given their level of seniority and the level of scrutiny and quality control which is applied to the investigations, the Commissioner considers this expectation to be reasonable. In conclusion, although they do have a level of autonomy, their roles are not sufficiently responsible and accountable to justify disclosure of their names in the public interest.
79. As the Commissioner is satisfied that providing the names of the investigators would contravene the first data protection principle, he has not gone on to consider the other data protection principles.

The Decision

80. The Commissioner's decision is that the public authority dealt with the request for information concerning the names of the investigators in accordance with the Act.

Steps Required

81. The Commissioner requires no steps to be taken.

Right of Appeal

82. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 8th day of November 2010

Signed

**Pamela Clements
Group Manager, Complaints Resolution**

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

Legal Annex

Personal information

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“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 the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

“In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.”

The Data Protection Act 1998

Schedule 1 – the Data Protection Principles

1. “Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.”