

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 November 2012

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

Decision

1. The complainant made a freedom of information request to the Financial Services Authority (FSA) for a list of its staff at manager level and above which had previously been disclosed in March 2010. The FSA refused the request by relying on the section 36(2)(c) (prejudice to effective conduct of public affairs) exemption and the section 40(2) (personal information) exemption in the case of the individuals who had left the FSA or moved roles since the list was produced. The Commissioner has investigated and found that section 36(2)(c) is engaged but the public interest favours disclosure. The Commissioner also found that section 40(2) was engaged in respect of individuals who had left the FSA by the time of the complainant's request but was not engaged in respect of the individuals who were still employed by the FSA but had moved roles.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The FSA shall disclose to the complainant the information falling within the scope of the complainant's request with the exception of the names of individuals who have since left the FSA, which should be redacted.
3. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 13 January 2012 the complainant made a request to the Financial Services Authority (FSA) for a list of all its staff at manager level and above. In response the FSA disclosed an organogram containing the names of Head of Departments and above. However the names of managers was withheld under the exemption in section 36(2)(c) because, the FSA explained, disclosure of this information at a time when it was transitioning into two new organisations would prejudice the effective conduct of public affairs.
5. On 14 February 2012 the complainant made a second freedom of information request to the FSA. It is this request which is the subject of this decision notice. It read as follows:

I would be most grateful if I could have a list of all staff and their positions at manager level and above up to the point at which the FSA effectively began transitioning into two new organisations as described in your email below. I understand that the last such request that was successfully made was in March 2010 so I would expect that such a list or organisational chart will be based on or after that time and ideally as near as possible to the date of April 4th 2011 when the transition effectively began (please see attachment by way of explanation for date chosen).

6. The FSA responded on 9 March 2012 and confirmed that it held information falling within the scope of the request. However, it said that the requested information was exempt under section 36(2)(c) (Prejudice to effective conduct of public affairs). Where the information related to members of staff who had since left the FSA the information was withheld under section 40(2) (Personal information).
7. On 9 March 2012 the complainant asked the FSA to carry out an internal review of the request and at this point said that he would be willing to refine the request to exclude the details of those who had since left the FSA.
8. The FSA presented the findings of the internal review on 10 April 2012 and upheld the earlier decision to refuse the request.

Scope of the case

9. The complainant contacted the Commissioner to complain about the FSA's decision to refuse his request under the section 36(2)(c) and

section 40(2) exemptions. The complainant also asked that the Commissioner consider whether the FSA dealt with his request of 14 February 2012 in accordance with the FOIA, without reference to the subsequent refinement made on 9 March 2012. The complainant explained that this refinement was suggested as way of a compromise but since the FSA was unwilling to change its initial response he did not think it unreasonable for the Commissioner to consider the complaint based on the original request. The Commissioner agreed to accept the complaint on this basis.

Reasons for decision

10. The complainant requested details of the FSA's staff list in the knowledge that the FSA had released such a list, as it was then, in March 2010. Whilst this information had been released to a previous applicant the information does not appear to have entered the public domain more widely. Upon receiving the complainant's request the FSA decided that the circumstances had changed since the previous disclosure and the information should now be withheld under the exemptions in sections 36(2)(c) and 40(2).
11. Section 36(2)(c) has been applied to the majority of staff on the list who would be still in employment with the FSA. The FSA noted that some staff on the list, given that it was produced prior to the request, would have left the FSA's employment or changed roles. Section 40(2) was applied to the names of these individuals.

Section 36(2)(c) – prejudice to effective conduct of public affairs

12. The FSA explained that whilst it had disclosed its staff list in March 2010 the circumstances had now changed. This is because in June 2010 it was announced that the FSA would be abolished and transformed into separate organisations. Therefore it said that the FSA was in a period of transition and to release its staff list at this stage would be prejudicial as it could lead to employees being targeted by external recruiters or headhunters which could lead to them being recruited by other organisations.
13. Section 36(2)(c) provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
14. When deciding if the exemption is engaged the Commissioner has to first establish that an opinion was given on the application of the

exemption by a proper qualified person. In this case the FSA explained that it originally obtained the qualified person's opinion in respect of the complainant's first request of 13 January 2012 but that it considered that the opinion would also cover the second request given that it asked for the same information; the names of its managers, albeit for the list as it would have been prior to April 2011.

15. The qualified person's opinion was given in writing by Martin Wheatley, the Conduct Business Unit, Managing Director on 3 February 2012. The opinion was technically issued prior to the complainant's request but since this was effectively a repeat of the earlier request, in the Commissioner's view it was appropriate for the FSA to have referred to the qualified person's opinion which was offered in respect of the first request given the similarity and the short period of time between requests. It would have been unreasonable to have expected the FSA to have obtained a second opinion for the second request given that this would have been identical to the opinion already offered. The Commissioner has also established that Martin Wheatley was a proper qualified person for the purposes of section 36. Therefore, the Commissioner is satisfied that a qualified person's opinion was properly obtained and so has gone on to consider whether the opinion was a reasonable one.

16. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following:

"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable." ¹

17. In order to determine whether section 36(2)(c) is engaged the Commissioner will consider:

- whether the prejudice claimed relates to the specific subsection of section 36(2) that the FSA is relying upon;
- the nature of the information and the timing of the request; and
- the qualified person's knowledge of or involvement in the issue.

18. When deciding that section 36(2)(c) was engaged the qualified person gave his opinion that disclosure would be likely to prejudice the effective conduct of public affairs because a 'wholesale' disclosure of managers' details would increase the risk of those staff being approached to work

elsewhere. This would have a significant impact on the smooth running of the FSA.

19. The Commissioner is satisfied that the qualified person's opinion is a reasonable one. The qualified person had been given a submission including only relevant materials and had sufficient knowledge of the issues discussed to form a reasonable opinion on the application of the exemption. The FSA is an important and high profile organisation and the experience and expertise of its staff would be attractive to other organisations within the financial sector. Therefore it is reasonable to conclude that other organisations may try to recruit these members of staff if the information were disclosed. As a result it is possible that some staff could leave the FSA and given that the FSA was in the process of separating into two new regulators, this may make it more difficult to carry out its functions. The Commissioner has not reviewed the withheld information as he does not consider it necessary in order to consider the application of the exemption.
20. The Commissioner is aware that the FSA had previously disclosed a staff list in March 2010. However, a previous disclosure will not automatically mean that the information has entered the public domain and in this case the Commissioner is satisfied, having carried out relevant searches, that the information is not publicly available. Whilst it would not have been appropriate for the FSA to have relied on section 36 were the information already publicly available, a public authority may refuse to disclose information it has disclosed previously if the information is not in the public domain and the circumstances have changed since the previous disclosure.
21. The Commissioner has decided that section 36(2)(c) is engaged and he has now gone on to consider the public interest test.

Public interest test

22. The public interest test is separate from the qualified persons' opinion which is only about the likelihood of prejudice occurring. If the Commissioner accepts that the opinion is reasonable then he accepts that the specified prejudice would or would be likely to occur. However when considering the public interest test he is able to consider the severity, extent and frequency of that prejudice and balance this against the public interest in disclosure.
23. The complainant has argued that the public interest favours disclosure because it is unfair to have disclosed the information to one person (in March 2010) and then to have refused to make it publicly available at the time of his subsequent request.

24. The FSA acknowledged that disclosure would serve the public interest by promoting openness and transparency, and thereby accountability, in more senior levels of the organisation.
25. As regards the public interest in maintaining the exemption the public authority took the following factors into account:
 - An increased risk of staff being approached to work elsewhere could lead to a 'talent vacuum' within the organisation because some of the best and most talented members of staff within a certain level could leave, reducing specialist knowledge and expertise relied upon by the FSA to set up successfully the two new regulators as well as in the execution of its day to day functions.
 - Part of the FSA's focus would have to be redirected to replacing staff at the expense of dealing with more pressing matters. The FSA would also be stretched in its ability to meet its current statutory objectives and any new objectives set by the government.
 - Disclosure could have a damaging impact on the reputation of the FSA and the new organisations which need to be established.
26. In balancing the public interest the Commissioner has given due weight to the opinion of the qualified person. However, when considering the severity and extent of any disclosure the Commissioner is not satisfied that releasing the names of its managers would have a serious impact on the FSA. In reaching this view the Commissioner is mindful that the names of more senior managers within the FSA, Head of departments and above, are already published. One might expect that senior members of staff leaving would have a much more severe effect on the ability of the FSA to meet its functions, yet the Commissioner has seen nothing to suggest that publicising the names of staff at a certain level has led to staff leaving the organisation.
27. Whilst the information having been previously disclosed does not necessarily mean that the information is in the public domain, the fact that the FSA had previously decided that it would not be prejudicial to disclose the information is relevant. It would be reasonable to conclude that given that the information had been disclosed in the March 2010 had this had a serious impact on staffing levels then the FSA would be able to demonstrate this by referring to any increased staff turnover. The FSA produced no such evidence and in fact it appears that staff turnover is comparatively low when compared against other organisations in the sector.

28. One might reasonably expect that staff who would be most likely to be persuaded by an approach from an external recruiter would already have explored the possibilities of moving jobs. There are many sites available today such as *linkedin* which allow professionals to network and share their details and so it's also likely that recruitment firms would already be able to access the details of FSA staff by other means. Furthermore, given the FSA's role as the regulator of the financial services firms it is likely that the names of managers would already be known within the industry. As such the Commissioner considers that the severity of any prejudice is reduced.
29. As the Commissioner has already acknowledged, he gives due weight to the opinion of the qualified person and therefore accepts the possibility that some staff could be persuaded to leave the FSA if their details were made available. However, the Commissioner notes that the FSA is a large organisation with approximately 4000 staff.¹ A significant number of staff would need to leave were this to have a serious impact on the ability of the FSA to meet its functions or to damage the transition into two new regulators. The Commissioner is not satisfied that releasing this information would have such an effect and in his view the severity, extent and frequency of any prejudice caused by staff leaving in the event of the list being released is low.
30. As regards the public interest in disclosure the Commissioner accepts that releasing the names of its managers would serve the principles of greater transparency and accountability although he finds that these arguments are essentially more general in nature. In the Commissioner's view the arguments in favour of disclosure are not particularly strong but given the presumption in favour of disclosure and what he has found to be the relatively minor prejudice that would be caused, the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Section 40(2) – Personal information

31. The public authority explained that the list was produced in response to the request in March 2010 and therefore some individuals included on the list of managers would have already left the FSA or moved grades at the time of the current request. The FSA explained that it was applying the personal information exemption to any such names.

¹ <http://www.fsa.gov.uk/about/media/facts>

32. Section 40(2) provides that information is exempt if the information is the personal data of someone other than the applicant and disclosure would satisfy one of two conditions. In this case it is the first condition which is relevant which is that disclosure would contravene one of the data protection principles. The FSA has explained that in its view disclosure would contravene the first data protection principle which requires that data be processed fairly and lawfully.

Is the information personal data?

33. When deciding whether the exemption is engaged the first thing for the Commissioner to consider is whether the requested information is personal data. Personal data is defined in the Data Protection Act 1998 as:

"...data which relate to a living individual who can be identified-

- a) From those data, or*
- b) From those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

34. The information withheld under this exemption is the name and job title of managers at the FSA who had left the organisation or had moved positions in the period between the list being produced and the complainant's request. This information relates to these individuals, is biographical to them and would allow the individuals to be identified. The Commissioner is satisfied that the information is personal data.

The first data protection principle

35. The Commissioner has next gone on to consider whether disclosure would contravene the first data protection principle. When considering whether a disclosure under FOIA would be fair the Commissioner's approach is to reach a balanced view after taking into account the following factors:

- The expectations of the individuals
- The possible consequences of disclosure
- Nature and content of the information

36. The FSA has argued it would be unfair to release the information as the individuals would have no expectation of disclosure after they had left the FSA or had moved positions within the FSA. The FSA referred to the fact that its staff operate in an environment where, because of the nature of its work, great importance is attached to confidentiality. It explained that issues of confidentiality were referred to explicitly in its staff handbook and contracts of employment signed by staff.
37. In making its argument the FSA also referred the Commissioner to a previous Decision Notice regarding a request for the names of staff within the FSA's Enforcement, Financial Crime and Intelligence Division.² In this decision the Commissioner had decided that disclosure of the names of staff at the associate and technical specialist grades would be unfair, in part because the individuals were not in public facing roles.
38. The FSA also argued that disclosing the names of staff who had left the FSA or changed grades would be unfair as it is likely that they would find it distressing and upsetting to have their names disclosed when other individuals in similar positions would not.
39. When considering the expectations of the individuals concerned the Commissioner is of the view that a crucial factor is the previous disclosure of the list of managers in 2010. Whilst the Commissioner established that the information had not entered the public domain, disclosure under the FOIA is considered to be a disclosure to the world at large. Therefore any members of staff who had left the FSA or changed positions, knowing that the list had previously been released, might reasonably have concluded that their names and job titles were already publicly available. As such they would have a reasonable expectation that the information would be disclosed. Moreover, when the FSA released the list in 2010 it would have been alive to the possibility that individuals named on the list may leave the organisation at some point in the future. This did not stop them from releasing the information.
40. The Commissioner is not satisfied that individuals would be distressed or caused upset by having very limited information relating to their professional life disclosed.
41. As regards the reference to the previous decision notice, the Commissioner notes that in that case the FSA had actually released the

² http://www.ico.gov.uk/~media/documents/decisionnotices/2010/fs_50276863.ashx

names of managers within the Enforcement, Crime and Intelligence Division. In that case the FSA had accepted the Commissioner's view that such senior individuals within the organisation had a high level of accountability and responsibility which warranted the disclosure of their names. In any event, the Commissioner does not consider himself bound by his previous decision.

42. In light of the above the Commissioner has found that disclosure of the names of managers who have left the FSA or who have changed positions would not be unfair. However, for disclosure to comply with the first data protection principles one of the conditions in schedule 2 of the DPA 1998 must also be satisfied.

43. As the FSA suggested, the Commissioner considers that it is the sixth condition which is relevant in this case. This condition requires that:

The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

44. The Commissioner's approach is to consider whether the 6th condition is met by way of the following 3 part test which must be satisfied:

- there must be legitimate interests in disclosing the information,
- the disclosure must be necessary for a legitimate interest of the public and,
- even where the disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject(s).

45. Whilst the Commissioner would accept that there is a legitimate interest in transparency over individuals employed by the FSA in management roles, in his view this does not extend to individuals who have subsequently left the FSA. Whilst disclosure may not be unfair, in the Commissioner's view there is very little to be gained by knowing details of an individual's former role at the FSA, an organisation they no longer work for. Therefore the Commissioner has decided that for any individuals included on the staff list who have left the FSA in the period between it being produced and the complainant's request, disclosure would not satisfy a schedule 2 requirement. Consequently the Commissioner has decided that the section 40(2) exemption is engaged for this information.

46. Given that the list was produced prior to the complainant's request the FSA said that some of the individuals named on the list would have moved roles, for instance through a promotion. This information has also been withheld under section 40(2). For this information the Commissioner has found that there is a legitimate interest in disclosure as the individuals are still employed by the FSA and releasing the names would promote transparency. Furthermore, disclosure is necessary since the names of these individuals are not in the public domain and the Commissioner is not aware of any other means by which this transparency could be achieved. The Commissioner is also mindful of the fact that any individuals who have moved roles will in all likelihood be at the same level of seniority or higher, in the case of a promotion. As indicated above, the Commissioner does not accept that disclosure of such limited information would be unfair and therefore has reached the view that releasing the information would not interfere with the rights, freedoms or legitimate interests of these individuals. Consequently, the Commissioner has decided that disclosure of this particular information would meet a schedule 2 condition and as such the section 40(2) exemption is not engaged.

Right of appeal

47. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0116 249 4253
Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

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