

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2013

Public Authority: Financial Services Authority

Address: 25 The North Colonnade
Canary Wharf
London
E14 5HS

Decision (including any steps ordered)

1. The complainant has requested information about Financial Services Authority (FSA) enquiries into an overseas property investment scheme run by [named company]. The FSA refused to provide the requested information under section 40(2), section 42, section 43(2) and section 44(1)(a) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the FSA has correctly applied section 40(2), section 43(2) and section 44(1)(a) FOIA to withhold some of the requested information. As section 42 FOIA was applied to the same information as section 44(1)(a) FOIA, the Commissioner did not consider the application of section 42 FOIA any further. However there is some information to which no exemptions have been applied.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Comply with section 1 FOIA in relation to the information to which no exemptions have been applied. These are the parts of the withheld information which were provided to the Commissioner, which were not marked with exemptions.
4. 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

5. On 26 July 2012, the complainant wrote to the FSA and requested information in the following terms:

"I am aware that the FSA has conducted certain enquiries into an overseas property investment scheme run by [named company] Furthermore that following these enquiries the cases was referred by the FSA to the Serious Fraud Office for further investigation.

Under the Freedom of Information Act please provide me with copies of any reports compiled by the FSA during and/or following these enquiries and or any referrals made to the SFO or other agencies."

6. On 20 August 2012 the FSA responded. It denied holding the requested information.
7. The complainant requested an internal review on 21 August 2012. The FSA sent the outcome of the internal review on 4 October 2012. It said that it did hold information within the scope of the request, however this was exempt from disclosure under section 40(2), section 42, section 43(2) and section 44(1)(a) FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 9 October 2012 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the FSA was correct to withhold the requested information under section 40(2), section 42, section 43(2) and section 44(1)(a) FOIA.

Reasons for decision

10. Section 44 FOIA provides that

"(1) 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.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)."

11. The FSA has explained that section 44(1)(a) exempts information from disclosure if its disclosure is prohibited by any other enactment or rule of law.
12. The FSA has claimed that the request is for 'confidential information', the release of which under FOIA is prevented by section 348 of the FSMA.
13. Section 348(1) of the FSMA states that –

"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.
14. The operation of the statutory bar is dependent on the consideration of the following issues; firstly, whether the FSA can be classified as a primary recipient, secondly, whether the request is for 'confidential information' and if so, thirdly, whether there is consent to the release of the information or whether this could be obtained.

Is the FSA a primary recipient?

15. A primary recipient is defined at section 348(5) of the FSMA and includes the FSA. The Commissioner therefore accepts that the FSA is a primary recipient for the purposes of the FSMA.
16. The FSA has explained that its application of section 44 extends to the FSA's views, considerations and other internally-created information, where the 'created' information incorporates information received by the FSA from an external party. It said that disclosure of the 'created' information would disclose the content or nature of the confidential information which has been received by the FSA, given the inextricable link between these types of information.
17. The Commissioner accepts the FSA's application of section 44 to the withheld information on this basis.

Is the request for confidential information?

18. The FSMA defines 'confidential information' at section 348(2). This describes it as information which relates to the business or other affairs of any person and was received by the primary recipient for the purposes of, or in the discharge of, its functions and is not prevented from being confidential.
19. Breaking down the components of the definition, the Commissioner must consider the following questions when seeking to establish whether information is 'confidential' –
 - Does the information relate to the business or other affairs of any person?
 - Was the information received by the primary recipient for the purposes of, or in the discharge of, its functions?
 - Has the information already been made legitimately available to the public?
 - Can the information be anonymised?
20. The Commissioner has first considered if the information relates to the business or affairs of another person. A person is not defined in FOIA, thus the Commissioner has adopted the usual legal interpretation of a person, namely any entity that is recognised as having legal personality to enter into legal relations.
21. The Commissioner is satisfied that the information does relate to the business or affairs of another person, in this case [named company]. He has therefore gone on to consider whether the information was received by the FSA for the purposes of, or in the discharge of, any of its functions.
22. The FSMA has explained that it is concerned with the regulation of financial services and markets in the UK. Under section 19 of the FSMA a person may not carry on a regulated activity in the UK unless he is authorised or exempt. Breach of this prohibition is a criminal offence and also exposes the offender to civil remedies at the hands of its clients as well as the FSA. It confirmed that the FSA has functions of inquiring into, investigating and if appropriate taking action through the courts against persons who breach the prohibition.
23. In this case the FSA has explained that the [named company] is not authorised or regulated by the FSA. However the FSA considered that it may have been carrying out a regulated activity for which FSA authorisation is required. It therefore said that the information it

obtained about the [named company's] activities was received for the purpose of carrying out its function of making inquiries as to whether there had been a breach of the prohibition.

24. The Commissioner is content that the FSA was fulfilling a regulatory function by receiving the information.
25. Section 348(4) FSMA also states that information may not be deemed confidential information if it has legitimately made available to the public or it can be anonymised.
26. The Commissioner considers that information will only have been legitimately made available where it has already been placed in the public domain without breaching the FSMA. There is no indication that this has occurred here.
27. Section 348(4) of the FSMA additionally stipulates that information cannot be confidential information if it can be summarised or so framed that it is not possible to ascertain from it information relating to any particular person. The Commissioner does not consider this to be a relevant consideration in this case. This is because the focus of the request itself, which makes [named company] its subject, removes the possibility of making the information anonymous.
28. For the reasons outlined above, the Commissioner has determined that the information is confidential information pursuant to section 348(2) of the FSMA.

If it is confidential information is there consent to its release or can this be obtained?

29. The FSMA allows that information may be disclosed if consent has been received from the person that provided the FSA with the information, in this case [named company].
30. The Commissioner understands that [named company] has not given its consent to the release of the requested information. As such, he considers that the information remains confidential information for the purposes of the statutory bar provided by section 348 of the FSMA.
31. The FSA was therefore correct to rely on section 44(1)(a) of FOIA to withhold the requested information.

Section 40(2)

32. Section 40(2) FOIA provides an exemption for information which is the personal data of any individual, aside from the requester, and where

disclosure of that personal data would be in breach of any of the data protection principles.

33. The Commissioner has first therefore considered whether the information redacted under section 40(2) is the personal data of one or more third parties.
34. Personal data is defined in section 1(1) of the Data Protection Act 1998 (DPA) as:
"data which relate to a living individual who can be identified –
 - (i) from those data, or
 - (ii) 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 intention of the data controller or any other person in respect of the individual."
35. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
36. The information redacted only under section 40(2) are names and signatures of FSA employees. The Commissioner considers that this is information which relates to a living person and from which they would be identifiable. This would therefore be third party personal data.
37. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.
38. The FSA has explained that the named employees would not have expected their names or signatures to be released in this context, they have not consented to this disclosure and disclosure could be harmful and detrimental to the named employees.
39. The Commissioner accepts that the FSA employees wouldn't have expected their names and signatures to be disclosed in this context,

and furthermore certainly disclosure of their signatures could be harmful and detrimental to those individuals in terms of opening them up to potential fraud.

40. Whilst there is a legitimate public interest in understanding how the FSA makes decisions in terms of its enforcement actions, there is minimal legitimate public interest in disclosure of individual names in this context. Particularly as in this case, much of the rest of the requested information has been withheld under other exemptions. Disclosure of the names of the FSA employees would not really provide the public with much of an understanding behind the decision making process in this context. The Commissioner is also aware that the named FSA employees have not consented to the disclosure of their names or signatures.
41. The Commissioner considers in this case that the names and signatures of FSA employees were correctly withheld under section 40(2) FOIA.

Section 43(2)

42. Section 43(2) FOIA provides an exemption from disclosure of information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
43. The FSA has explained that the complainant requested information relating to enquiries about a named company. It has explained that it considers that the named company's commercial interests would be likely to be prejudiced if this information were disclosed.
44. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the named company's commercial interests.
45. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43. This comments that,

 "...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.
46. The Commissioner considers that the successful bid relates to the sale of services by the named company, which does therefore relate to their commercial interests.

47. The Commissioner therefore considers that the withheld information falls within the scope of the exemption.
48. The Commissioner has gone on to first consider how any prejudice to the commercial interests of the successful bidder would be likely to be caused by the disclosure of the requested information.
49. The FSA has explained that it continually engages with regulated and unregulated companies, and disclosure of information about a company as a result of such an engagement would be likely to prejudice the commercial interests of that company. It has provided further details in support of this position, contained in the confidential annex attached to this Notice.
50. In this case the FSA has not contacted the company to obtain its views on disclosure and whether it considers the prejudice would be likely to occur. The Commissioner must determine whether the prejudice claimed is "real, actual or of substance". In this case, having viewed the withheld information and the FSA's submissions contained in the confidential annex attached to this Notice, the Commissioner is satisfied the prejudice claimed is real, actual and of substance despite the fact that it has not obtained the company's views on disclosure in this case.
51. The Commissioner therefore considers that section 43(2) was correctly engaged in this case.
52. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in this case.

Public interest arguments in favour of disclosing the requested information

53. The Commissioner considers that there is a public interest in the FSA operating in an open and transparent way and that the FSA is held accountable for the decisions it makes. The FSA regulates the financial services industry which is accessed by the majority of the population and therefore, as the regulator of this industry, there is a strong public interest in disclosing information which demonstrates that it is carrying out this work effectively.

Public interest arguments in favour of maintaining the exemption

54. The FSA has explained that it believes the following public interest arguments favour maintaining the exemption:

- The FSA has said that it would not be in the public interest to disclose information about its inquiries where no decision has been reached to take formal enforcement action. It said that this would be likely to prejudice the commercial interests of the company concerned and this would not be in the public interest.

Balance of the public interest

55. The Commissioner considers that there is a public interest in openness and transparency, and in accountability in relation to the regulatory activity of the FSA. The Commissioner also considers that there is a public interest in disclosure of information which will inform the public about how decisions are made.
56. The Commissioner does however consider that there is a strong public interest in not disclosing information which would be likely to commercially disadvantage private companies which may have been investigated by the FSA, but as a result no decision has been reached to take formal enforcement action.
57. On balance, the Commissioner considers in this case that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption.

Right of appeal

58. 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

59. 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.
60. 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

Pamela Clements
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