

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 April 2013

**Public Authority:** The Financial Conduct Authority<sup>1</sup>

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

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of the agreement reached between the Financial Services Authority (FSA) and a number of banks in connection with the interest rate swaps compensation scheme. The Commissioner's decision is that the FSA correctly applied section 44 (prohibition on disclosure) and 21 (information accessible by other means) of FOIA. He does not therefore require any steps to be taken as a result of this notice.

#### Request and response

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2. On 19 July 2012 the complainant wrote to the FSA and requested information in the following terms:

*(1) A copy of the agreement reached between the FSA and Barclays, HSBC, Lloyds and RBS in relation to the interest rate swaps compensation scheme; and*

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<sup>1</sup> At the date of the information request and subsequent complaint to the Information Commissioner the responsible public authority was the Financial Services Authority (FSA). However, for the purposes of this decision, from 1 April 2013 the FSA was succeeded by the Financial Conduct Authority. For the sake of clarity, though, this decision notice refers to the FSA as if it were the public authority.

*(2) Details of what the FSA considers to constitute 'fair and reasonable redress' under that agreement.*

3. The FSA responded on 14 August 2012. In relation to request (1), the FSA confirmed it held the requested information but advised that this was exempt from disclosure under section 44 of FOIA, by virtue of section 348 of the Financial Services and Markets Act 2000 (FSMA). In respect of request (2), the FSA clarified that any redress would be determined by an independent reviewer and would depend upon the outcome of a review of the particular issue.
4. The complainant wrote to the FSA again on 10 September 2012 challenging its decision to withhold the information described by request (1). The FSA subsequently carried out an internal review, the outcome of which was provided to the complainant on 12 October 2012. This upheld the FSA's original position and also explained that the respective banks had been approached in response to the request but none had consented to disclosure.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 15 October 2012 to complain about the FSA's decision to withhold information under section 44 of FOIA.
6. During the Commissioner's investigation, the FSA has provided further submissions to support its application of section 44 of FOIA. It has also advanced the possibility that section 43(2) (commercial interests) of FOIA would apply in the alternative and claimed that a limited amount of information had already been published and so would be covered by section 21 of FOIA.
7. The FSA's revised position is addressed by the Commissioner in the body of this notice.

### **Reasons for decision**

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#### **Section 21 – information accessible by other means**

8. Section 21 of FOIA provides that information is exempt from disclosure if it is reasonably accessible to the applicant.

9. The FSA has identified during the course of the Commissioner's investigation that information contained in an annex to the requested agreement was also contained in its press notice (FSA/PN/071/2012)<sup>2</sup>. In addition, the annex contains an update that accompanied the press notice providing further details about the hedging products, the FSA's work and the agreement.
10. For the exemption to be engaged, the circumstances and knowledge of an individual applicant are not relevant. What matters is whether a hypothetical interested member of the public could access the information at the time of the request.
11. The press notice and accompanying update were published on the FSA's website on 29 June 2012. The Commissioner has therefore determined that this information was available to a member of the public at the date of the request, 19 July 2012. Section 21 is therefore engaged with respect to the particular information described above.

#### **Section 44 – prohibition on disclosure**

12. Section 44(1)(a) of FOIA states that information is exempt if its disclosure is prohibited by or under any enactment. The FSA has claimed that the request is for 'confidential' information, the release of which under FOIA is prevented by section 348 of FSMA.
13. Section 348 sets out the restrictions on disclosure of confidential information received by the FSA – it must not be disclosed by a primary recipient (in this case the FSA) without the consent of the person from whom the primary recipient obtained the information and, if different, the person to whom the information relates.
14. Section 348 also defines confidential information for the purposes of the legislation. That is, information that relates to the business or other affairs of any person, was received by the primary recipient for the purposes of, or in the discharge of, any of the FSA's functions and has not already been made available to the public.
15. The Commissioner has been advised by the FSA that it has not been provided with consent from any of the parties subject to the specified agreement. It is therefore left for the Commissioner to decide whether

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<sup>2</sup> <http://www.fsa.gov.uk/library/communication/pr/2012/071.shtml>

the agreement satisfies the definition of confidential information set out in FSMA. If so, the information will be exempt information under section 44 of FOIA.

16. There is no doubt that the information requested relates to the business or other affairs of any person, namely the banks featured in the request, as required under section 348 of FSMA. Furthermore, the Commissioner is satisfied that should the information be found to have been received by the FSA, it would have been received for the purposes of discharging the FSA's function of regulating the financial services and markets in the UK. The key question in this case is therefore whether the information was *received* by the FSA as the primary recipient.
17. A dictionary definition of 'received' connotes something acquired by one party from another. In considering whether an agreement could reasonably be said to be *received*, the Commissioner has initially found it helpful to refer to his experience of the application of section 41 (information provided in confidence) of FOIA. This section also covers the issuing of *receiving* information, albeit in the specific context of a public authority *obtaining* information from a third party.
18. The Information Tribunal in *Derry City Council v the Information Commissioner* (EA/2006/0014)<sup>3</sup> upheld the Commissioner's argument on section 41 which said that generally a written agreement between parties will not constitute information acquired by one party from another. This is because something like a contract is mutually agreed and not obtained by either party to that contract. The example set by *Derry* would therefore suggest that the FSA would be unable to claim that it had received the agreement produced between it and the other banks which were subject to the agreement
19. However, the Commissioner also appreciates that what constitutes *received* information for the purposes of FSMA is not necessarily clear-cut. Firstly, the FSA has argued that the example given by *Derry* is not applicable to the circumstances as they are presented here. Specifically, it has pointed out that the Tribunal in *Derry* was considering a conventional commercial agreement. In contrast, the agreement in the present case "has been entered into in a regulatory context, and represents a voluntary acceptance of obligations by the banks as an alternative to the FSA using its formal powers to obtain redress."

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<sup>3</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i69/Derry.pdf>

Secondly, the FSA considers that any parts of an agreement which expressly refer to what the banks will do is received information because it tells the FSA what action the banks intend to take. Thirdly, the FSA has referred to "embedded" information contained in the agreement. According to the FSA, this is a shorthand way of saying that both the bank and the FSA have agreed to do something – the bank's side of the agreement is therefore received information.

20. In his decision on FS50218346<sup>4</sup>, which also involved the FSA and the application of section 44, the Commissioner acknowledged that it may not always be immediately obvious whether information could be said to be received. For example, he recognised that in negotiations involving discussions going backwards and forwards between the FSA and a third party, the origin of recorded information may be obscure. Therefore, to enable him to reach a decision on whether section 44 of FOIA was engaged, he considered the intention of the authors of the prohibition set out at section 348 of FSMA:

*"19. [...] Having examined the wording of section 348 of FSMA, the Commissioner notes it applies a deliberately wide definition of what constitutes "confidential information" that may not be disclosed. The definition in section 348 of FSMA does not apply any restriction to when the information was "received" or whether it has been processed once already by the FSA and is being used for the second time [...]"*

21. The Commissioner considers that a wide definition of "confidential information" must similarly be applied here.
22. The Commissioner agrees with the FSA that for the purposes of section 348 of FSMA there is a difference between a commercial agreement and an agreement entered into in a regulatory context. He considers that unlike a commercial agreement which is mutually settled on by the relevant parties, a regulatory agreement represents the culmination of an investigation carried out by the FSA; an investigation ultimately based on the information received from the banks. In this sense, and unlike the *Derry* case, the Commissioner considers that it is appropriate to conclude that the agreement contains *received* information.
23. In saying this, the Commissioner recognises that not all of the agreement will be directly or clearly equivalent to the information

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<sup>4</sup> [http://www.ico.org.uk/~media/documents/decisionnotices/2010/FS\\_50218346.ashx](http://www.ico.org.uk/~media/documents/decisionnotices/2010/FS_50218346.ashx)

received from the banks. However, as mentioned previously, because the origin of the information is not obvious does not mean it cannot be found to be *received* information. Specifically, the Commissioner considers that if parts of the information had been disclosed it would have been possible for a member of the public to trace back to the confidential information.

24. The Commissioner is therefore satisfied that, with the exception of the information to which section 21 of FOIA has been applied, the agreement falls within the definition of confidential information contained in section 348 of FSMA. He has also not been provided with any evidence that indicates the agreement has been made available to the public in circumstances which would mean the information was not confidential under section 348(4) of FSMA. The Commissioner has therefore decided that the agreement is exempt information under section 44 of FOIA by virtue of section 348 of FSMA.
25. As the Commissioner has decided that section 44 of FOIA is engaged, he has not been required to consider the application of section 43(2) of FOIA to the same information.

## Right of appeal

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26. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

27. 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.
28. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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