

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 November 2009

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

Summary

The complainant requested information from the Financial Services Authority (FSA) about details concerning complaints provided to the FSA in 2006 and 2007 by the top 125 most complained about companies. The FSA refused to disclose the requested information by virtue of the exemption in section 44 of the Act ('prohibitions on disclosure'). The Commissioner has investigated and found that the requested information would be exempt by virtue of section 44(1)(a) of the Act.

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. The complainant made a request to the FSA on 13 May 2008 for a summary of the information about complaints provided to the FSA in the following terms:

In the FSA discussion paper 08/03 "Transparency as a Regulatory Tool" (May 2008 paras 6.3 -6.29) the FSA reveals that it requires each of the 14,500 regulated firms to provide information twice a year on the customer complaints it has received and how they are dealt with. In particular the firms reveal how long it takes to deal with a complaint, the number upheld in the customer's favour, and the amount of redress paid in those cases.

I am writing to request under the Freedom of Information Act 2000 a summary of the information on complaints provided to the FSA in 2006 and 2007 by the top 125 firms (by numbers of complaints received). In particular I am writing to request information for each firm on the numbers of complaints, how long they take to deal with complaints, the number of complaints upheld in the customer's favour, and the amount of any redress or compensation paid.

Discussion paper 08/03 does not suggest that there are any legal constraints on providing this information.

Information in summary form will fulfil this request provided the data relates to each of the 125 firms and they are named. Please make available any information in response to this request as it becomes available and do not delay information which will be made available while awaiting a decision on information which will not be made available.

3. The FSA responded on 30 June 2008, confirming that it held the information requested but refusing to disclose it on the basis of the exemption in section 44 of the Act with reference to section 348 of the Financial Services and Markets Act 2000 (FSMA).
4. The complainant sought an internal review of the FSA's decision on 18 July 2008 and set out reasons why he disagreed with the decision. The FSA replied on 15 August 2008 and stated the original decision to withhold the information was maintained. Responding to the points made by the complainant when requesting internal review, the FSA agreed that section 349 of FSMA provided exceptions to the general restrictions on disclosure of information in section 348. The complainant argued that fulfilling its obligations under the Act was one of the FSA's "public functions" and section 349 of FSMA provided exceptions for the disclosure of information in such circumstances. The FSA disagreed because section 44(1)(a) of the Act makes clear that disclosure to a requester had to be considered without taking into account any obligations imposed by the Act. Therefore disclosure under the Act was not a "public function" as defined in section 349(1)(a) of FSMA.
5. In addition, the complainant had referred to regulation 3 of the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 as providing a route to disclosing the requested information. Again, the FSA disagreed, arguing that the "self help" gateway provided by regulation 3 that allows the FSA to disclose confidential information to help it carry out its functions under FSMA could not be used to force the FSA to reach a decision as to whether it was prepared to disclose information via a gateway.

The Investigation

Scope of the case

6. On 20 August 2008, 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 whether the FSA's interpretation of regulation 3 was wrong because the regulations did not contain any consideration of whether the FSA was "prepared" to disclose information, rather the regulation turned on whether doing so would enable or assist the FSA to discharge any of its public functions. The complainant explained why, with reference to the four central regulatory functions of the FSA as set out section 2(2) of FSMA, the disclosure of the requested information would assist the FSA in discharging its public functions of public awareness and protection of customers.

Chronology

7. The Commissioner wrote to the FSA on 18 June 2009 to advise that the complaint was being investigated and to request sight of the information that had been withheld to assist with the investigation of the complaint. The FSA provided the withheld information on 31 July 2009 and referred to its letter to the complainant dated 15 August 2008, which set out the reasons why the information was exempt under section 44 of the Act.
8. On the same date, the Commissioner wrote to the complainant to give an initial view on the complainant's reading of regulation 3 as set out in his complaint to the Commissioner (see paragraph 6 above). The Commissioner's understanding of regulation 3 was that it was permissive rather than mandatory, which on a preliminary assessment tended to support the FSA's interpretation rather than the complainant's. The complainant was invited to comment further on this point. The complainant replied the same day, confirming he wished to proceed with the complaint but making no comment on the Commissioner's preliminary assessment of regulation 3.

Analysis

Exemptions

9. Section 44(1)(a) of the Act provides that information is exempt information if its disclosure is prohibited by or under any enactment. The prohibition relied upon by the FSA is that contained within FSMA. The full text of the relevant legislation is contained in the legal annex.
10. Section 348 of FSMA prohibits the disclosure of 'confidential information' received by any primary recipient for purposes of or in the discharge of any of the FSA's functions without the consent of the person who supplied the information or, if different, the consent of the person to whom it relates. For the purposes of this part

of FSMA, the FSA is a primary recipient. 'Confidential information' means information that relates to the business or other affairs of any person. Information is not 'confidential information' for the purposes of section 348 of FSMA if it has already been made available to the public or it is in summary form so that it is not possible to ascertain from it information relating to a particular person. Section 349 of FSMA sets out the exceptions from the restrictions on disclosure in section 348.

11. The FSA states the information sought is 'confidential information' as defined in section 348(2) of FSMA because it was received from regulated firms in connection with the FSA's function to supervise those regulated firms, specifically monitoring the firms' compliance with the rules in the Dispute Resolution: Complaints sourcebook of the FSA Handbook. In addition, the FSA made clear in its letter of 15 August 2008 that the firms providing the information had not given consent to its disclosure.
12. In his complaint to the Commissioner, the complainant referred to regulation 3(1)(a) of the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, made under section 349 of FSMA, which permits the disclosure of confidential information when it will enable or assist the discharge of any of the public functions of the FSA. The complainant noted that in the discussion paper that had led to the present information request the FSA had considered the case for disclosing information of the type requested and had stated that if it decided to do so it could use what it termed in the discussion paper "the self-help gateway" provided by regulation 3(1)(a). The complainant argued that on his reading of regulation 3(1)(a) where the disclosure of confidential information would enable or assist the FSA to discharge any of its public functions then information should be disclosed. The complainant provided further argument to show how the information requested would assist the FSA in discharging its public functions.
13. Having examined the withheld information, the Commissioner is satisfied it is 'confidential information' within the terms of section 348(2) of FSMA and there was no consent to disclosure. It has not been made public and it could not, by virtue of the specific terms of the request asking for information on "the top 125 firms" with their names, be made available in a summary form that would allow for publication without individual firms being identified.
14. In considering the complainant's comments about the applicability of regulation 3(1)(a), the Commissioner agrees that disclosure of information of the type requested could assist or enable the FSA in discharging its public functions with regard to public awareness and protection of consumers. However, as noted in his letter of 18 June 2009, the Commissioner reads regulation 3(1)(a) as being permissive rather than mandatory. It provides the FSA with a "gateway" that permits the disclosure of confidential information where that will enable or assist the FSA in discharging any of its public functions. However nothing in regulation 3(1)(a) requires the FSA to disclose confidential information on every occasion that such disclosure might enable or assist the FSA to discharge its public functions.

Procedural Breach

15. The FSA responded to the complainant's request, which was made on 13 May 2008, on 30 June 2008. Consequently, the Commissioner notes that the FSA failed to comply with the time limit in section 10(1) of the Act.

The Decision

16. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- correctly applying the exemption in section 44 to the withheld material.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- the public authority failed to comply with the time limit in section 10(1) of the Act and therefore breached section 10(1).

Steps Required

17. The Commissioner requires no steps to be taken.

Right of Appeal

18. 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@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 served.

Dated the 3rd day of November 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

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.”

Financial Services and Markets Act 2000

Disclosure of information

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.

(5) Each of the following is a primary recipient for the purposes of this Part—

- (a) the Authority;
- (b) any person exercising functions conferred by Part VI on the competent authority;
- (c) the Secretary of State;
- (d) a person appointed to make a report under section 166;
- (e) any person who is or has been employed by a person mentioned in paragraphs (a) to (c);
- (f) any auditor or expert instructed by a person mentioned in those paragraphs.

(6) In subsection (5)(f) “expert” includes—

- (a) a competent person appointed by the competent authority under section 97;

- (b) a competent person appointed by the Authority or the Secretary of State to conduct an investigation under Part XI;
- (c) any body or person appointed under paragraph 6 of Schedule 1 to perform a function on behalf of the Authority.

349 Exceptions from section 348

- (1) Section 348 does not prevent a disclosure of confidential information which is—
 - (a) made for the purpose of facilitating the carrying out of a public function; and
 - (b) permitted by regulations made by the Treasury under this section.
- (2) The regulations may, in particular, make provision permitting the disclosure of confidential information or of confidential information of a prescribed kind—
 - (a) by prescribed recipients, or recipients of a prescribed description, to any person for the purpose of enabling or assisting the recipient to discharge prescribed public functions;
 - (b) by prescribed recipients, or recipients of a prescribed description, to prescribed persons, or persons of prescribed descriptions, for the purpose of enabling or assisting those persons to discharge prescribed public functions;
 - (c) by the Authority to the Treasury or the Secretary of State for any purpose;
 - (d) by any recipient if the disclosure is with a view to or in connection with prescribed proceedings.
- (3) The regulations may also include provision—
 - (a) making any permission to disclose confidential information subject to conditions (which may relate to the obtaining of consents or any other matter);
 - (b) restricting the uses to which confidential information disclosed under the regulations may be put.
- (4) In relation to confidential information, each of the following is a “recipient”—
 - (a) a primary recipient;
 - (b) a person obtaining the information directly or indirectly from a primary recipient.
- (5) “Public functions” includes—
 - (a) functions conferred by or in accordance with any provision contained in any enactment or subordinate legislation;
 - (b) functions conferred by or in accordance with any provision contained in the Community Treaties or any Community instrument;
 - (c) similar functions conferred on persons by or under provisions having effect as part of the law of a country or territory outside the United Kingdom;
 - (d) functions exercisable in relation to prescribed disciplinary proceedings.
- (6) “Enactment” includes—
 - (a) an Act of the Scottish Parliament;
 - (b) Northern Ireland legislation.

(7) "Subordinate legislation" has the meaning given in the [1978 c. 30.] Interpretation Act 1978 and also includes an instrument made under an Act of the Scottish Parliament or under Northern Ireland legislation.

The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001

DISCLOSURE OF CONFIDENTIAL INFORMATION GENERALLY

Disclosure by and to the Authority, the Secretary of State and the Treasury etc.

3. (1) A disclosure of confidential information is permitted when it is made to any person -

(a) by the Authority or an Authority worker for the purpose of enabling or assisting the person making the disclosure to discharge any public functions of the Authority or (if different) of the Authority worker;

(b) by the Secretary of State or a Secretary of State worker for the purpose of enabling or assisting the person making the disclosure to discharge any public functions of the Secretary of State or (if different) of the Secretary of State worker;

(c) by the Treasury for the purpose of enabling or assisting the Treasury to discharge any of their public functions.

(2) A disclosure of confidential information is permitted when it is made by any primary recipient, or person obtaining the information directly or indirectly from a primary recipient, to the Authority, the Secretary of State or the Treasury for the purpose of enabling or assisting the Authority, the Secretary of State or the Treasury (as the case may be) to discharge any of its, his or their public functions.

(3) Paragraphs (1) and (2) do not permit disclosure in contravention of any of the directive restrictions.