Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 November 2009

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

Summary

The complainant asked the public authority for information about two firms of stockbrokers. The public authority did not hold information about one; provided a small amount of information about the other; and applied the exemptions under sections 44, 43 and 40 of the Freedom of Information Act 2000 ('the Act') to the remaining information. After the Commissioner's intervention the public authority indicated that it was prepared to release some further information; it added the exemptions under sections 21 and 31 to some of the information; and identified further information held which fell within the request, the processing of which was likely to bring the whole request over the appropriate costs limit and so render it non-disclosable under section 12. The Commissioner decided that the request could have been refined to bring it within the costs limit, had the public authority identified all of the relevant information at the outset. He also decided that some of the information was exempt under sections 21, 40 and 44 of the Act but, in breach of section 1(1), the public authority had failed to disclose other information to which the cited exemptions under sections 21, 31, 40, 43 and 44 did not apply. The Commissioner further decided that the public authority had failed to identify all relevant information falling within the request and therefore provide adequate written notification about whether it was held, in breach of section 1(1)(a); and that it had delayed in disclosing information in breach of sections 10(1) and 1(1)(b). The Commissioner required the public authority to disclose the information which it had improperly withheld.

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 3 May 2006 the complainant requested from the Financial Services Authority (the FSA):

   'Information concerning:
   Pritchard Stockbrokers Ltd;
   Premier Equity Ltd.'

   He also asked the FSA to notify him if it was aware that the information might be held by another public authority.

3. The FSA acknowledged these requests on 4 May 2006. It asked the complainant to provide further clarification of what information he required about Pritchard Stockbrokers Ltd and Premier Equity Ltd.

4. The complainant replied on the same day, specifying that he wanted:

   '1. the documents which were used to prepare the public entries on the FSA Register concerning Pritchard Stockbrokers Ltd and Premier Equity Ltd;
   2. any other correspondence between the FSA and Pritchard Stockbrokers Ltd and/or Premier Equity Ltd.'

5. On 10 May 2006 the FSA asked the complainant to provide further clarification, including details of the time period to which his request related.

6. The complainant replied on the same day that the request was for the following items in the period since January 2005:

   '1. documents submitted by Pritchard Stockbrokers Ltd to the FSA to prepare its public entry on the register;
   2. documents submitted by Premier Equity to the FSA to prepare its public entry on the register;
   3. correspondence between Pritchard Stockbrokers and the FSA;
   4. correspondence between Premier Equity and the FSA'.

7. The FSA responded on 17 May 2006 that the request was still too broad and required refinement to make it manageable within the time/cost constraints for freedom of information responses. It suggested ways in which the complainant could narrow the request.

8. The complainant replied on the same day that he would amend the third part of the request to *'correspondence between the FSA and Pritchard relating to Premier Equity and/or Michael Brown'*.

9. The FSA issued its refusal notice on 25 May 2007. It stated that it did not hold any information relating to the second and fourth points of the request:

'Premier Equity Ltd is an Appointed Representative of Pritchard Stockbrokers Ltd. This means that Premier Equity Ltd does not have a direct relationship with the FSA. All documents and correspondence in relation to Premier Equity Ltd have been provided to the FSA through its principal, Pritchard Stockbrokers Ltd'.

Of the information which it did have it enclosed two documents, but claimed that the remainder was exempt under sections 44, 43 and 40 of the Act. It notified the complainant of his right to request an internal review and to complain to the Information Commissioner.

10. On 26 May 2006 the complainant requested an internal review of the decision in relation to sections 43 and 40. In relation to section 43 he claimed that it was unacceptable that information should be withheld under the Freedom of Information Act because the FSA feared that as a result some of those whom it regulated would fail to cooperate with it in the future. Regarding section 40 he stated that the requested information did not relate to Michael Brown's personal data but only to his role as a regulated financial professional.

11. The FSA acknowledged the request on 2 June 2006, and on 28 July provided its decision that the exemptions had been correctly applied.

The Investigation

Scope of the case

12. On 7 August 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He objected to the application of the exemptions. In particular, he found 'worrying' the FSA's argument that disclosure could potentially harm the commercial interests of Pritchard Stockbrokers Ltd by leading to adverse press comment leading to loss of new business or an undermining of the confidence of existing customers.

Chronology

13. On 30 January 2007 the Commissioner asked the FSA to clarify which exemptions were being applied to which elements of the requested information.

14. The FSA replied on 2 February 2007 that all of the information in the first point of the complainant's request was covered by section 44, while section 40 applied to some of it; regarding the third point, some of the information was covered by section 44 and some by section 43, while section 40 also applied to some of the information which engaged those other two exemptions.

15. On 5 February 2007 the Commissioner asked the FSA to provide him with a copy of the information which had been withheld.

16. The FSA forwarded this on 6 March 2007. It stated that it was now prepared to release a small amount of the information previously withheld under section 43 of the Act. It also indicated that, upon further review, it considered that some of the information, which it identified, fell under section 21. In relation to the first point in the complainant's request, it explained that it now considered that request to be for the documents which comprised the original application pack submitted by Pritchard Stockbrokers Ltd to the Securities and Futures Authority (SFA) in 1988. It stated that a check of its records could not find this original pack, although some of the information from it would be retained and publicly accessible on its website. The original application pack had also included forms with details of approved persons which amounted to over a hundred forms which were held off-site in archive, although the forms submitted with the original pack would have been destroyed in accordance with the FSA's retention schedule. However, it stated that the cost of retrieving these forms *'would probably exceed the appropriate cost limit applicable to the FSA'*, and the information *'would be'* exempt under sections 44, 40 and 21. It pointed out that blank copies of the application forms for approved persons were available on its website.

17. On 18 January 2008 the Commissioner asked the FSA to comment on some outstanding queries. Amongst other things, the Commissioner invited the FSA to consider whether either of section 30 and 31 might apply to any of the withheld information.

18. The FSA replied on 19 February 2008. Part of its response was that it now considered that section 31 applied to some of the information which it had originally withheld under section 43, while it agreed to disclose some other information. It also indicated that, were the complainant's request to be interpreted as including all of the applications of individuals to be added or removed from the list of approved persons relating to Pritchard Stockbrokers Ltd (rather than just the original application pack received in 1988), then the appropriate cost limit would be exceeded and none of the requested information would need to be disclosed by virtue of the costs provisions in section 12 of the Act.

19. The Commissioner contacted the FSA again on 1 April 2008 with further queries.

20. The FSA replied on 16 April 2008.

Findings of fact

21. The FSA is the regulator for financial services in the United Kingdom. Its statutory powers are granted by the Financial Services and Markets Act 2000 (FSMA). It has rule-making, investigatory and enforcement powers to meet four statutory objectives: to promote efficient, orderly and fair markets and to help retail consumers achieve a fair deal.

22. Pritchard Stockbrokers Ltd originally applied to the Securities and Futures Authority (SFA) in 1988 to become an authorised firm. It was authorised and regulated by the SFA until December 1991 when regulatory responsibility was transferred to the FSA.

Analysis

Procedural matters

23. During the course of the Commissioner's investigation the FSA agreed to disclose some further information to the complainant. Section 10(1) of the Act requires that *'a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt'*. The Commissioner has therefore decided that, in not disclosing some information to the complainant until after he had made the complaint, the FSA breached sections 10(1) and 1(1)(b) of the Act.

Appropriate cost limit – section 12

24. After the Commissioner contacted it, the FSA reconsidered the request and concluded that the first part was actually a request for the documents comprising the original application pack submitted by Pritchard Stockbrokers Ltd to the SFA in 1988. Since the FSA failed to identify all of the information which matched the description specified in the request it did not give the complainant adequate written notification about whether it was held. That constitutes a breach of section 1(1)(a) of the Act, which specifies 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…'.*

25. The FSA stated that a check of its records could not find this original pack, but:

> *'core information about Pritchard's status, the activities it carried on, who were its owners and managers etc was transferred over from the old SFA system into the new FSA system. The FSA system, in turn, feeds the Register, which is publicly accessible on our website. Therefore, while we do hold some information about Pritchard, we no longer hold the information requested.'*

The original application pack had also included forms with details of approved persons relating to Pritchard Stockbrokers Ltd which had subsequently been updated over the years as individuals were added or removed, so that there were now possibly 140 forms archived off-site. However, the FSA stated that

forms over ten years' old, including those submitted with the original application, had been destroyed in accordance with its retention schedule. Furthermore, it claimed that the cost of retrieving forms from the archives would exceed the appropriate cost limit, so that if the request were interpreted as including this information then by virtue of section 12 of the Act the FSA would not be obliged to provide any information at all.

26. Section 12(1) of the Act states:

> *'Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'*

The appropriate limit is currently set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). A public authority may take into account the cost of locating, retrieving and extracting the requested information in performing its calculation. The Regulations set a limit of £450 to the cost of complying with a request for all public authorities subject to the Act not listed in Schedule 1 part 1, this equates to 18 hours work at £25 per hour.

27. The Commissioner sought clarification of the potential costs. The FSA estimated that, for each of the estimated 140 forms, it would take 5 minutes to retrieve the archive reference, 20 minutes to locate the relevant case file, and 5 minutes to retrieve the relevant form. Accordingly, it estimated that it would take 69.94 hours to deal with the work involved which, in addition to the 12.5 hours work which had already been done, would amount to a total cost of £2,061 at the allowable rate of £25 per hour. The Commissioner has examined the evidence and is satisfied with the FSA's calculations. He is also satisfied that the calculations are limited to costs which the FSA reasonably expects to incur in:

    - determining whether it holds the information;
    - locating documents containing the information;
    - retrieving documents containing the information;
    - extracting the information from documents containing it.

    Accordingly, the costs are properly restricted to what Regulation 4(3) specifies as the work which a public authority may take account of for the purposes of its estimate of the cost limit. The Commissioner has therefore decided that section 12 could be applied to the request were it to be the case that these application forms were covered by it.

28. The Commissioner has asked the FSA what advice and assistance it might give to the complainant to help him bring the request within the appropriate limit. The FSA suggested that the request (insofar as it related to the application forms for updating the approved persons) could be limited to the forms for particular time periods, named individuals or a specific controlled function (ie position at the firm), but it pointed out that this would exceed the cost if it produced more than 36 forms in total. In light of this suggestion, and

the fact that the FSA did not consider the issue of the original application pack and subsequent application forms, and therefore the relevance of section 12, until a complaint had been made to the Commissioner, the Commissioner asked the FSA to consider searching the application forms by reference to the named individual 'Michael Brown'. He did this because, in his communication to the FSA of 17 May 2006, the complainant made it clear that what he was interested in was information relating to Michael Brown's involvement with Pritchard Stockbrokers Ltd. The FSA's response was that it would be possible to retrieve this form within the cost limit. However, it stated that the complainant had not requested such information in relation to Mr Brown, and while it would be willing to discuss any new request for this information, it considered that all of the information in the personal application forms would be exempt under section 44 and (except for limited information about Michael Brown available via the Register on its website, which would fall under the section 21 exemption) section 40.

29. The Commissioner's view is that, since the FSA has accepted that these forms fell within the original request, it is not appropriate that the complainant should be obliged to submit a further request for them at this stage. However, he notes the FSA's claim that they would be exempt from disclosure under section 44. The Commissioner has decided that, in respect of the forms, were the FSA to have refined the request by giving advice and assistance to the complainant and thereby identified information from the forms disclosure of which did not exceed the appropriate costs limit, that information would nevertheless have been exempt from disclosure under section 44. The section 44 exemption is addressed in the next section.

Exemption – section 44

30. In relation to most of the information which it had withheld the FSA applied section 44. Section 44 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.'*

31. The FSA identified the relevant enactment as section 348 of the Financial Services and Markets Act 2000, which it noted made it a criminal offence for the FSA to disclose 'confidential information' it had received except in certain limited circumstances, which did not apply in this case. Section 348(1) states:

> *'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.'

Section 348(2) defines 'confidential information' as that 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…'.

32. The Commissioner asked the FSA whether it had asked those from whom the information was obtained or to whom it applied whether they would consent to its disclosure. The FSA replied that it would consult with the relevant parties. It subsequently informed the Commissioner that consent had been refused. Accordingly, the Commissioner has decided that the information which falls within section 44 was reasonably withheld by the FSA.

33. The Commissioner notes that, in both his request for internal review and in his complaint to the Commissioner, the complainant did not object to the FSA's application of section 44. However, he notes that some of the information to which section 44 was applied comprises information created by the FSA, mainly queries which it raised with other parties. The Commissioner takes the view that some of this is not *'confidential information'* which *'was **received** by the primary recipient for the purposes [etc]'* (emphasis added), as laid down in section 348 of the Financial Services and Markets Act. He has therefore required disclosure of this part of the information withheld by reference to section 44.

34. Having considered the remaining information to which the FSA applied section 44, and the provisions of section 348 of the Financial Services and Markets Act 2000, the Commissioner is satisfied that it was reasonable for the FSA to have withheld the information on the grounds that a statutory bar operated to prevent disclosure.

Exemption – section 43

35. Some of the information did not fall within section 44 because it was not information that the FSA had 'received' for the purposes or in discharge of its functions. To some of this information the FSA originally applied section 43. After contact from the Commissioner, it restricted its application of section 43 to part of one document. It also applied section 31 to the same information. Section 43(2) provides that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

Having considered the information to which the FSA is applying this exemption, the Commissioner notes that it was held in order for the FSA to investigate potential regulatory breaches on the part of a firm of stockbrokers. The Commissioner accepts that it is 'commercial' information in the relevant sense.

36. To engage the exemption it is necessary for the public authority to demonstrate that disclosure of the information would prejudice some party's commercial interests. In this case the FSA has not offered any evidence that the third party firm has itself expressed the view that its commercial interests might be prejudiced by disclosure of the information. It speculated that the commercial interests of Pritchard Stockbrokers Ltd could be harmed because the information concerned such matters as *'the systems and controls of the firm'*, and because *'Public disclosure could result in adverse press comment leading to loss of new business or an undermining of the confidence of existing customers'*.

37. When considering prejudice to a third party's commercial interests the Commissioner considers that the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect; the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation, and the relevant arguments are those made by the third party itself. This stance was established by the Information Tribunal in the case of *Derry City Council v The Information Commissioner* (EA/2006/0014). The Tribunal decided to disregard the third party's commercial interests when reaching its decision on the grounds that the public authority could not expound them on behalf of the third party:

> *'Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure of its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that [the third party's] commercial interests would be likely to be prejudiced'*.

38. Where a public authority can provide evidence that its arguments genuinely originate in and reflect the concerns of the third party involved then the Commissioner may take them into account. Nevertheless, he considers that there is a presumption that, when an argument is adduced which relies on alleged prejudice to third parties, then evidence will be presented that the perception of potential prejudice is one which was shared by those third parties.

39. In this case, the Commissioner does not consider that the generic and hypothetical factors upon which the FSA speculated have demonstrated that disclosure 'would be likely' to prejudice the commercial interests of Pritchard

Stockbrokers Ltd. Accordingly, he has decided that the section 43 exemption is not engaged. Unless it is exempt by virtue of section 31, the information which was withheld by reference to section 43 should therefore be disclosed.

Exemption – section 31

40. The Commissioner invited the FSA to consider whether either of section 30 and 31 might apply to any of the withheld information. The FSA's response was that it now considered that section 31(1)(g) and section 31(2)(a), (b), (c) and (d) applied to part of one document to which it was also applying section 43, with the public interest test being the same. It claimed that disclosure of the withheld information *'would be likely to result in firms being less open with us, so adversely affecting our ability to monitor their compliance with our requirements'*.

41. Section 31(1) provides that:

> *'Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-*
>
> > *…(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)…'.*

Section 31(2) states:

> *'The purposes referred to in subsection (1)(g) to (i) are-*
>
> > *(a) the purpose of ascertaining whether any person has failed to comply with the law,*
> >
> > *(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,*
> >
> > *(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,*
> >
> > *(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on...'.*

42. The Commissioner accepts that, as the regulator for financial services in the United Kingdom with statutory rule-making, investigatory and enforcement powers under the Financial Services and Markets Act 2000, the FSA has law enforcement functions with a clear basis in law which fall within section 31(2)(a), (b), (c) and (d).

43. To engage the section 31 exemption it is necessary for the public authority to demonstrate that disclosure of the information would or would be likely to cause some relevant prejudice. The Commissioner's interpretation of 'likely to prejudice' is that there should be evidence of a significant risk of prejudice to the subject of the exemption. The degree of risk must be such that there 'may very well' be prejudice to those interests. Whether prejudice exists is to be decided on a case by case basis. The prejudice test is a dynamic concept and different levels of prejudice will occur at different times according to the varying circumstances in the which the relevant enforcement activity takes place.

44. The prejudice identified by the FSA was that disclosure of information *'previously considered confidential would be likely to result in firms being less open with us, so adversely affecting our ability to monitor their compliance with our requirements'*. Having considered the relevant information, the Commissioner is not satisfied that disclosure would have that effect, since the relevant passage comprises a question from the FSA to Pritchard Stockbrokers Ltd enquiring about Mr Brown's involvement with the firm. This enquiry was made after alleged offences, convictions and outstanding warrants in the United States of America relating to Michael Brown had been reported in the press. The Commissioner considers that the fact that the FSA made such an enquiry of the firm in these circumstances was something that the parties involved and indeed the public could have expected, and that disclosure of the information merely confirms that expectation. The Commissioner does not consider that such disclosure in these circumstances is likely to undermine the appropriate relationship of trust between the FSA and the bodies which it regulates.

45. Since he does not consider that disclosure would be likely to cause any prejudice, the Commissioner had concluded that the section 31 exemption is not engaged with respect to this information, and it should therefore be disclosed.

Exemption – section 40

46. The FSA indicated that, to the extent that some of the requested information was personal information about an individual, it was exempt under section 40(2)(b) of the Act. Section 40(2) of the Act allows public authorities to exempt information that constitutes the personal data of third parties:

> *'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.'*

The first and second conditions are set out in section 40(3) and (4).

47. The relevant condition in this case is at section 40(3)(a)(i), where disclosure would breach any of the Data Protection Principles. The Data Protection Principles are set out in Schedule 1 of the Data Protection Act 1998. In this case the FSA has claimed that disclosure of personal data would breach the First Data Protection Principle, which states:

> *'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…'*

Accordingly, personal data may not be disclosed unless to do so would be fair, lawful and would satisfy at least one of the conditions in Schedule 2.

48. The Commissioner has decided that the FSA can satisfy one of the conditions in Schedule 2, Condition 6(1):

> *'The processing is necessary for the purposes of 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.'*

This issue was addressed in the Information Tribunal case of *House of Commons v the Information Commissioner and Leapman, Brooke, Thomas* (EA/2007/0060, 0061, 0062, 0063, 0122, 0123, 0131). The Tribunal decided that the 6th Condition created a two-part test: first, disclosure must be necessary for a legitimate interest of the public; secondly, it must not cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject. The case involved requests to the House of Commons for details of the expenses that MPs had claimed for their second homes. The Tribunal accepted that the word 'necessary' carried connotations from the European Convention on Human Rights:

> *'Interference with private life can only be justified where it is in accordance with the law, is necessary in a democratic society for the pursuit of legitimate aims, and is not disproportionate to the objective pursued.'*

49. In other words, interference with private life could only be justified where it is in accordance with the law, is necessary in a democratic society for the pursuit of legitimate aims, and is not disproportionate to the objective pursued (a pressing social need is involved and the measure employed is proportionate to the aim). The Tribunal identified two questions to test this approach in the specific case:

> *'(A) whether the legitimate aims pursued by the applicants can be achieved by means that interfere less with the privacy of the MPs (and, so far as affected, their families or other individuals),*

> *'(B) if we are satisfied that the aims cannot be achieved by means that involve less interference, whether the disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of the MPs (or anyone else).'*

50. Having considered the information at issue and the arguments put forward, the Commissioner is satisfied that the legitimate interests of the public in having knowledge of most of the information relevant to section 40 in this case could not be satisfied in some other way than disclosure of this information. Further, he does not consider that disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of the relevant data subjects, except in relation to some of the contact details and the identities of relatively junior officials. Accordingly, the 6th Condition provided by Schedule 2 was met for the purposes of the 1st Data Protection Principle.

51. The FSA explained in its internal review decision that release of the data:

> *'may be detrimental to the individuals involved…They would not have expected information provided to the FSA to be made public, because of the operation of section 348 [Financial Services and Markets Act]…'.*

In relation to Mr Brown specifically, it rejected the complainant's argument that the requested information concerned Mr Brown's role as a regulated financial professional rather than as a private individual, since this was *'a narrow unacceptable definition of "personal" data'.* It explained that there:

> *'is nothing in the [Data Protection Act] to exclude information about a person's business activities. As with any Approved Person, the FSA holds information about Mr Brown of a biographical nature, as it relates to his fitness and propriety to be approved. We regard this as personal data because the information is of a type that would reasonably be regarded as engaging Mr Brown's privacy, in the same way that e.g. his medical records and bank statements would be so regarded.'*

52. In order to consider whether disclosure of the information would be 'unfair' or 'unlawful', or would fail to satisfy Condition 6(1) in Schedule 2 of the Data Protection Act, the Commissioner has addressed separately the information relating to: contact details; directors of Pritchard Stockbrokers Ltd other than Michael Brown; and relatively junior officials at the FSA.

53. In relation to contact details – for example email addresses – the Commissioner considers that these constitute personal data, and that it would generally be unfair to the individuals owning them if they were to be disclosed. The Commissioner considers that those to whom the details relate would have reasonably expected that their personal information would not be released. Disclosure of contact details to the 'world at large' in an uncontrolled way would also be likely to lead to detriments to the officials and to their ability to fulfil their official roles adequately. However, where addresses contain references to individuals' names the Commissioner considers that it would not be unfair to disclose those names as identificatory information, except where it

relates to the identity of relatively junior officials of the FSA (regarding which, see paragraph 55 below).

54. With respect to other directors of Pritchard Stockbrokers Ltd, the FSA stated that the fact that the identity of Pritchard Stockbrokers Ltd's directors was in the public domain did not mean that everything that they did in that capacity thereby became public. For this reason, it claimed that they would have an expectation that exchanges which they had with the FSA would be kept confidential, and disclosure of their names would therefore not be lawful or fair. The Commissioner accepts that there may be occasions when directors could legitimately expect that references to them in FSA documentation released into the public domain might be kept confidential. However, he does not consider that this is one of those occasions. The relevant documents are Written Notices of action which the FSA had decided to take in relation to Pritchard Stockbrokers Limited, addressed to Michael Brown and another director. The Commissioner's view is that it would not be unfair or unlawful for the name of that other director to be disclosed. In particular, he considers that a director could have a reasonable expectation that information of this sort might be disclosed by the regulator, and that there is no evidence that the other director would suffer any unnecessary detriment as a result of the disclosure.

55. Regarding the data relating to relatively junior officials working for the FSA, the Information Tribunal has ruled – in the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) – that there should be no blanket policy to withhold such names. Whether such information should be disclosed has to be decided on the particular facts*: 'A blanket policy on refusing to disclose the names of civil servants wherever they appear in departmental records cannot be justified'*; and *'There must, however be a specific reason for omitting the name of an official where the document is otherwise disclosable'*. However, in a further case (*Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072)) in which part of the requested information comprised the names of employees of lobbyist firms, the Tribunal made a finding that:

> *'a. Senior officials of both the government department and lobbyist attending meetings and communicating with each other can have no expectation of privacy;*
>
> *b. The officials to whom this principle applies should not be restricted to the senior spokesperson for the organisation. It should also relate to any spokesperson.*
>
> *c. Recorded comments attributed to such officials at meetings should similarly have no expectation of privacy or secrecy.*
>
> *d. In contrast junior officials, who are not spokespersons for their organisations or merely attend meetings as observers or stand-ins for more senior officials, should have an expectation of privacy. This means that there may be circumstances where junior officials who act as*

spokespersons for their organisations are unable to rely on an expectation of privacy;

e. The question as to whether a person is acting in a senior or junior capacity or as a spokesperson is one to be determined on the facts of each case.

f. The extent of the disclosure in relation to the named official will be subject to the application of the tests set out under paragraph 93 above, and will largely depend on whether the additional information relates to the person's business or professional capacity or is of a personal nature unrelated to business.'

56. The Commissioner takes the same view that section 40 may provide grounds for withholding the names of relatively junior employees, since they could reasonably expect their roles not to be exposed to the public gaze. In this case the FSA has redacted this information on the basis that it is not relevant to the request. The Commissioner considers that that is debatable and that the FSA could usefully have asked the complainant whether it was information which he wanted to receive. However, the Commissioner has decided that the FSA could reasonably have taken the view that it would be unfair to disclose information about the identities of more junior staff in this case. In the circumstances the Commissioner had determined that this information should be redacted as exempt by virtue of section 40(2)(b) of the Act.

Exemption – section 21

57. In providing its comments to the Commissioner on 6 March 2007, the FSA decided that a small amount of information should be withheld by virtue of section 21 of the Act. This related to information about approved persons which was available on the FSA's Register. In response to the Commissioner's query as to whether there was any specific reason for redacting this information, the FSA stated that it was now happy to release the information.
58. In its subsequent response to the Commissioner on 19 February 2008, the FSA applied section 21 to three further documents. The Commissioner accepts that section 21 would have been applicable to this information, which comprises two Written Notices issued by the FSA plus a covering letter. However, the Commissioner notes that, had the FSA applied section 21 at the time of the request, it would have been in a position to advise the complainant where he could obtain this information.

59. In the case of *Ames v Information Commissioner and the Cabinet Office* (EA/2007/0110), the Information Tribunal ruled that information might not be reasonably accessible to an applicant under section 21 unless the public authority could provide some specific reference to where it might be found:

'We are not at all sure that, in a case where a public authority is asked for a very specific piece of information which (ex hypothesi) it holds, it would be legitimate for the public authority to say to the applicant that the

information is somewhere to be found on a large website like that of the Hutton Inquiry, even if the applicant is someone as well informed as Mr Ames no doubt is. It may be different if the public authority were to provide a link or some other direct reference to where the requested information can actually be found.'

60. Since the FSA did not apply this section to the information until after the Commissioner had commenced his investigation, did not explain where the information might be found, and as the information is in the public domain, the Commissioner takes the view that the reasonable approach would now be for the FSA to provide the complainant with a copy of the relevant documents at the same time as it releases the other information which the Commissioner has determined should be disclosed. If it does not do so, it should provide the complainant with appropriate advice and assistance as to where he can obtain the information.

The Decision

61. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act. The FSA did not comply with its obligations under section 1(1) in that it failed to communicate to the complainant some of the information to which he was entitled, on the mistaken basis that it was exempt from disclosure under sections 31, 40, 43 and 44 of the Act. It also failed to identify information of the description specified in the request, and therefore give the complainant adequate written notification about whether it was held, in breach of section 1(1)(a). The Commissioner has further decided that, in disclosing some information to the complainant only after he had made a complaint to the Commissioner, the FSA failed to *'comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt'* and thereby breached sections 10(1) and 1(1)(b) of the Act.

Steps Required

62. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- The FSA should provide the complainant with the information identified in the separate Schedule which has been provided to it.

63. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

64. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

65. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The complainant requested an internal review of the FSA's decision on 26 May 2006. The FSA acknowledged the request on 2 June 2006 and confirmed that, should it be likely that the internal review would take longer than 30 working days to complete, they would contact the complainant to advise them of this. The internal review decision was provided on 28 July 2006, 44 working days after the date it had been requested. The FSA had not contacted the complainant to advise them of this late (by the timescales they had set) response.

66. There is no timescale laid down in the Act for a public authority to complete an internal review but the Commissioner has since issued guidance which recommends 20 working days from the date of request as a reasonable time for completing an internal review and (in exceptional circumstances) no later than 40 working days. Also, Part VI of the code of practice issued under section 45 of the Act states in this regard:

> *'41. In all cases, complaints should be acknowledged promptly and the complainant should be informed of an authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for exampled because of the complexity of the particular case), the authority should inform the complainant and explain the reason for the delay.'*

67. The Commissioner notes that, in failing to meet their own deadline for completion of their internal review and in failing to advise the complainant that their review response would be late the FSA failed to conform to Part VI of the section 45 code of practice.

Right of Appeal

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68. 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 18th day of November 2009

Signed ……..

Gerrard Tracey
Assistant Commissioner

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

Legal Annex

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 10(1) provides that –

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

Section 17(1) provides that -

'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.'

Section 17(3) provides that -

'A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'

Section 21(1) provides that –

'Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.'

Section 21(2) provides that –

'For the purposes of subsection (1)-

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.'

Section 31(1) provides that –

'Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime,
(b) the apprehension or prosecution of offenders,
(c) the administration of justice,
(d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
(e) the operation of the immigration controls,
(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
(i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.'

Section 31(2) provides that –

'The purposes referred to in subsection (1)(g) to (i) are-

(a) the purpose of ascertaining whether any person has failed to comply with the law,
(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
(e) the purpose of ascertaining the cause of an accident,
(f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
(g) the purpose of protecting the property of charities from loss or misapplication,
(h) the purpose of recovering the property of charities,
(i) the purpose of securing the health, safety and welfare of persons at work, and
(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.'

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(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.

Section 43(1) provides that –

'Information is exempt information if it constitutes a trade secret.'

Section 43(2) provides that –

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

Section 43(3) provides that –

'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).'

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.'

Section 44(2) provides that –

'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).'