

Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 19 September 2006

Public authority: Financial Services Authority

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

Summary Decision and Action Required

The complainant requested information on the compatibility of the Financial Services and Markets Act with Article 6 of the Human Rights Act from the Financial Services Authority. Although the authority did not hold the information as specifically described it did hold information of a similar nature which fell within the scope of the request. The authority refused to supply the information on the grounds that the exemption in section 42 of the Act applied, (legal professional privilege). The Commissioner's decision is that the exemption is applicable to the information, and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

1. Freedom of Information Act 2000 (the 'Act') – Application for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').

1.2 Where a Complainant has made an application for a decision, unless:

- a Complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the Complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the Complainant and the Public authority.

2. The Complaint

2.1 The Complainant has advised that on 1 Jan 2005 the following request for information was made to the Financial Services Authority (FSA), in accordance with section 1 of the Act.

2.2 *"I wish to see all Counsel's Opinions on the compatibility of the Financial Services and Markets Act 2000 and the Financial Ombudsman Service with the Human Rights Act 1998, this includes opinions bought by the Personal Investment Authority Ombudsman and the Bureau and the Treasury, in particular the opinion used by Gordon Brown to certify the FSMA Bill to be compatible with the Human Rights Act 1998."*

2.3 The FSA responded to the request on the 4 January 2005 acknowledging the request, and then provided a full response to the complainant on the 27 January 2005. In that response it stated that it did not hold a copy of the opinion provided to the Chancellor, but that it did hold an opinion obtained by the Investment Management Regulatory Organisation (IMRO). It also initially said that it held an opinion from the Personal Investment Authority Ombudsman Bureau. It then confirmed that this advice was subject to the exemption at s. 42 of the Act, (Legal Professional Privilege) and refused to disclose it to him. The Complainant emailed the FSA on the 15 February 2005, requesting a review of the initial decision. The FSA responded on the 4 April 2005 upholding its earlier decision for the same reason as regards the IMRO advice. However it stated that it had been mistaken as regards the Personal Investment Authority Ombudsman Bureau and that it held no advice falling within the scope of the complainant's request.

2.4 The Complainant complained to the Commissioner, on 16 May 2005, alleging that the FSA had failed in its duty to supply the requested information under Part 1 of the Act.

3. Relevant Statutory Obligations under the Act

3.1 **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 42 of the Act provides:

Legal Professional Privilege

42. - (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

4. Review of the case

Is the advice subject to legal professional privilege?

4.1 The Commissioner viewed the information and is satisfied that the information is subject to legal professional privilege for the following reasons;

- 1.It was provided to the organisations by Legal Counsel,
- 2.It contains legal advice, sought by IMRO, on the legal options available to it when setting up the Ombudsman’s regulatory regime.

4.2 As such, in the Commissioner's view this advice is subject to legal professional privilege.

4.3 The exemption at 42 of the Act is subject to a test of the public interest. Unless the public interest in maintaining the exemption is greater than the public interest in disclosing the information then the information must be released. The Commissioner has therefore assessed the public interest test in relation to disclosure of the requested information.

The public interest

- 4.4 Article 6 of the Human Rights Act lays down minimum standards for the right to a fair trial. The FSA sets the regulatory framework within which the Financial Ombudsman Service, (the “Ombudsman”), operates, and the requested information relates to legal options in setting up that regulatory framework in accordance with obligations under Article 6. The advice does not specifically address the compatibility of the Financial Services and Markets Act with Article 6, but addresses how the Ombudsman’s regulatory regime could be set up in order to comply with Article 6.
- 4.5 Under the regulatory framework set up by the FSA the Ombudsman is able to make decisions based upon what he perceives as “just and appropriate”, and order firms to take specified steps whether or not a Court could order those steps. He is also able to make awards for damage to reputation, distress, inconvenience and financial loss. In accordance with this he is able to impose compensation payments of up to £100 000 upon firms based upon his findings. His rulings are legally binding. Financial compensation awards may be recovered by complainants through the Courts if necessary. There are no rights of appeal for defendants, and public hearings are not usually held. The nature of the Ombudsman’s regulatory framework, and whether it is compatible with Article 6, therefore impacts strongly upon the position of financial advisors, as well as their clients. The requested information would help the general public to understand whether the framework is compatible with the Human Rights Act and to assess whether the FSA has set up its regulatory framework properly. The Commissioner therefore acknowledges that there is a significant public interest in disclosure of the information requested.
- 4.6 The Commissioner also recognises the obvious public interest in improving the accountability of the public authorities for the decisions they take, and the advice upon which the FSA made their decisions would clearly add to the public debate surrounding any compatibility issues.
- 4.7 However the Commissioner believes that there is also a strong public interest in maintaining the section 42 exemption.
- 4.8 The Commissioner notes the Information Tribunal’s recent decision in relation to the section 42 exemption (EA/2005/0023), which stated that, “... *there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.*” It goes on to state that: “*it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case.* “
- 4.9 The public interest in disclosing the information must therefore, at the least, match the public interest in maintaining the exemption before privilege will be overturned, and it is recognised by the Tribunal that the public interest in protecting the doctrine of legal professional privilege is strong.

- 4.10 The concept of legal professional privilege has developed to ensure that clients are able to receive advice from their legal advisors in confidence. This is an underlying principle of the justice system and there is a strong public interest in maintaining confidentiality. The doctrine of legal professional privilege ensures that advice provided is based upon a full exchange of information pertinent to the case. Eroding that doctrine would damage the degree of certainty that parties have that the advice they obtain will be confidential. This could be detrimental to the ability of parties to provide or receive legal advice on a full and frank basis, thereby damaging the parties' ability to effectively determine their legal options, or to defend, or seek legal restitution against other parties in accordance with their rights. It could also lead to bodies such as the FSA basing significant decisions on incomplete or defective legal advice - this would not be in the public interest.
- 4.11 As stated, a central question behind this request is whether the regulatory framework effectively reduces the Article 6 rights of financial advisors to defend their cases against the Ombudsman's decisions. As a contentious issue which has the potential to have a significant affect upon financial advisors and their clients, the regulatory framework can be legally challenged and there is a strong possibility that this may occur in the future.
- 4.12 The Commissioner's view is that there are strong public interest arguments against the disclosure of the requested information if this would allow those wishing to challenge the framework to circumvent the proper legal process for doing so by obtaining privileged advice which would be directly relevant to any case he or she chooses to bring against the FSA. This could damage the ability of the FSA to defend itself against any such legal challenge, and would undermine the concept of legal professional privilege. The fact that the framework can be legally challenged, and that the advice is therefore still "live", strengthens the argument against its disclosure.
- 4.13 A public authority must be able to seek legal guidance on the options open to it when making decisions. In this way it can assure itself that the decision it makes is both robust and legally defensible. Such guidance, although informing the final decision, should not generally be open to disclosure. If it were, this could weaken or compromise the authority's position should the decisions based on the legal advice be questioned later. Such advice may contain a detailed exposition of the weaknesses in a client's argument. Indeed the advice may first have been sought to examine such weaknesses. There is a risk that disclosure of such material may lead to a less than full and frank approach being taken by clients and advisers in the future, thereby devaluing the quality of the legal debate taking place between them.
- 4.14 To reiterate the Tribunal's arguments, legal advice should be free from the threat of interference except in the most clear of circumstances. The strong arguments supporting the maintenance of privilege should only therefore be overruled where the public interest arguments in favour of disclosing the information are equally as strong or override these arguments.

4.15 Whilst the Commissioner recognises a public interest in the disclosure of the information in this case, he does not believe it to be sufficiently strong to override the public interest in maintaining the exemption in section 42 of the Act.

4.16 Accordingly, the Commissioner's decision is that the public interest in maintaining the exemption in this case outweighs the public interest in disclosure.

5. The Commissioner's Decision

5.1 The Commissioner's decision in this matter is that the Public authority has dealt with the Complainant's request in accordance with the requirements of Part I of the Act.

6. Action Required

6.1 As the Commissioner's decision is that the Public authority has dealt with the complainant's request for information in accordance with the requirements of Part 1 of the Act. Therefore no remedial steps are required of the public authority.

7. Right of Appeal

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "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@dca.gsi.gov.uk



7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the day of 2006

Signed

Graham Smith
Deputy Commissioner

Information Commissioner
Wycliffe House
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Wilmslow
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SK9 5AF