

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 4 June 2007

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

Summary

The complainant requested information related to a review conducted between the FSA and Lincoln Assurance Limited. The FSA disclosed some information but withheld some documents under section 43 and others under section 44 of the Act. The Commissioner investigated the application of both exemptions and found that the FSA was correct to apply section 44. However, the Commissioner found that section 43 was not engaged and the Commissioner therefore requires the FSA to disclose the information withheld by virtue of section 43 within 35 calendar days from the date of this notice.

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 requested on 7 February 2005 that the FSA release to him the following information:

"1. (Settlement) Agreement between FSA and Lincoln Assurance Limited (ref. 139630 – address: Barnet Way, Barnwood, Gloucester, GL4 3RZ) in April 2003 – a final notice was issued on 16/4/03;

2. Documents relating to the agreed review of all Maximum Investment Plans;

3. *The definition of the review;*
4. *The agreed Methodology of the review;*
5. *Any agreed omissions from the review.*

3. On the 24 March 2005 the FSA responded to the request. The FSA confirmed it held information relevant to the request, however, the possibility that section 43 of the Act applied to the information was being considered. The FSA explained that as section 43 was a qualified exemption it was entitled to take more time to respond to the request in order to consider the public interest test. The FSA informed the complainant that it hoped to have a substantive response by the 15 April 2005.
4. On the 14 April 2005 the FSA provided a substantive response to the complainant. In the response the FSA confirmed that it was relying on section 43 'Commercial Interests' and additionally section 44 'Prohibitions on Disclosure'. The FSA explained that the information requested in points two to five constituted information obtained by the FSA from the firm concerned and that, under section 348 of the Financial Services and Markets Act (FSMA), information obtained in confidence by the FSA for the purposes of its functions is prohibited from disclosure.
5. The FSA also stated that in relation to point one of the complainant's request the information was exempt by virtue of section 43 of the Act. The FSA stated that disclosure of the information would inhibit future settlement agreements being reached as it would undermine firm's willingness to enter into dialogue with the FSA and take prompt remedial action. The FSA concluded that for these reasons the public interest lay in maintaining the exemption.
6. On the 18 April 2005 the complainant wrote to the FSA asking it to review its decision to withhold the information. In his letter to the FSA the complainant stated he had no wish to identify any particular person and was therefore happy to restrict his request to:

*“(a) the definition of the review
(b) the agreed methodology of the review
(c) the agreed omission of the review.”*

7. On the 7 June 2005 the FSA communicated the outcome of its internal review to the complainant. The internal review upheld the decision to withhold the requested information under sections 43 and 44.
8. The complainant wrote to the FSA on the 14 June 2005 to inform the FSA that he was taking his complaint to the Information Commissioner's Office (ICO). The complainant wrote again on the 31 August 2005 asking the FSA to consider a change in circumstances to the request, the change being that the complainant had now been able to establish a part of the methodology of the review.

9. The FSA carried out a further review on the 28 September 2005 informing the complainant that the 'change' referred to in his letter of the 31 August did not alter its position regarding disclosure of the requested information.
10. On the 30 September 2005 the complainant wrote to the FSA expressing his disappointment in their previous response and informing the FSA that unless they felt this could be resolved without recourse to the ICO he would be continuing with his complaint.
11. On the 4 October 2005 the complainant wrote to the ICO to complain about the FSA's refusal to disclose the information.
12. On the 10 October 2005 the complainant wrote to the FSA asking for another review of the decision and on the 6 November wrote again. On the 13 November 2005 and the 21 November 2005 the FSA responded again upholding its original decision to withhold the information under sections 43 and 44.

The Investigation

Scope of the case

13. On 4 October 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The FSA explained that it was dealing with the original request and not just the narrowed request.
14. The Commissioner's investigation focused on determining if the FSA was justified in relying on the exemptions at sections 43 and 44 of the Act.

Chronology

15. On the 15 February 2007 the Commissioner began his investigation by contacting the FSA and requesting further explanation regarding the application of each exemption and to see a copy of the information being withheld.
16. The FSA provided a substantive response to the Commissioner on the 22 March 2007 providing the Commissioner with further explanation regarding the application of the exemptions and copies of all the information being withheld. The FSA also explained that having reviewed the information withheld under section 43 they now felt it could disclose a 'settlement agreement' included in the set of documents sent to the Commissioner.
17. On the 26 March 2007 the Commissioner wrote again to the FSA requesting further explanation as to how the information contained in the documents sent through linked to either the complainant's original request or the refined request.

Findings of fact

18. The information withheld consists of 7 documents. Section 44 has been applied where the information was obtained by the FSA from another party and section 43 has been applied where the information constitutes the opinions or analysis of the FSA.
19. The information already in the public domain is the 'final notice' issued by the FSA in April 2003. The notice outlines the penalty being imposed; the rules governing the imposition of the penalty; the regulatory powers of the FSA, the reasons for the action; background information; details of the investigation and the outcome.
20. The review was conducted by Lincoln Assurance Limited (Lincoln) into City Financial Partners Limited (CFPL), its appointed representative, selling of Maximum Income Plans (MIP) and Maximum Saving Plans (MSP). The review was carried out in line with a proposal made by Lincoln to the FSA and the methodology was agreed between Lincoln and the FSA.
21. During the course of the investigation the FSA decided to disclose a particular document, the 'settlement agreement', to the complainant.

Analysis

Exemption – Section 43 Commercial Interests

22. Section 43 (2) provides that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it)..Section 43(2) is a qualified exemption and therefore if the commissioner finds that the exemption is engaged he must consider the public interest test as detailed at section 2(2)(b); in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
23. The FSA has explained that disclosure of the information would prejudice the commercial interest of itself and Lincoln Assurance Limited (Lincoln). The FSA have stated that it is in their interests to continue to have open and candid discussions with regulated firms without the need for formal action. The FSA argue that much of the remedial action firms take is the result of informal agreements and this results in more prompt remedial action being taken; this information is often not published. The formal process, the FSA contends, can lead to a referral to an independent tribunal and is therefore a lengthier process. The FSA state that, even where formal action has taken place, in order to achieve its objectives such as the compensation of customers; it will often not publish information, without agreement from the firm about which the information was to be announced. Disclosure would make firms less willing to engage in a dialogue with the FSA and take prompt remedial action without formal action; this would result in a drying up of information and co-operation which would harm the FSA's

effectiveness as a regulator. Whilst the Commissioner is mindful of the FSA's view that disclosure would inhibit candour from firms, he does not find this is a compelling argument relating to prejudice of the FSA's commercial interests.

24. The FSA state that the firm's commercial interests are at risk if they are not able to manage and predict what will be announced about its conduct, and therefore unable to take mitigating action in relation to its commercial reputation. The FSA state that a firm's ability to 'put matters behind it' would be at risk if additional information could be disclosed at any time. The risk of commercial prejudice therefore arises from unpredictable publicity about earlier non-compliance or possible non-compliance with regulatory requirements. Commercial prejudice to a firm can occur by disclosure of information about past events, after the adverse publicity surrounding the FSA's disciplinary action has subsided, and its share price and ability to win new business could be affected.
25. The Commissioner is not convinced that disclosure of additional information, after a formal decision has been made about a firm, would be likely to prejudice the firm's commercial interests. The prejudice to a firm would have occurred when the final notice was disclosed and whilst the Commissioner acknowledges the FSA argument that unpredictable disclosure after the fact could generate new adverse publicity, it is unlikely that further information into the public domain would add to the prejudice already suffered by the firm. The Commissioner also notes that the information withheld under section 43(2) relates mainly to the scope of the review.
26. The Commissioner also notes that under section 391(6) of the FSMA, prior to publishing the final notice, the FSA must consider 'if publication of it would, in its opinion, be unfair to the person with respect to whom the action was taken or prejudicial to the interests of the consumers'. The Commissioner therefore acknowledges that in publishing the final notice the FSA must have weighed up the potential damage to Lincoln and concluded that publication was fair.
27. The Commissioner is also mindful of the arguments put forward by the FSA of the impact to its interests in terms of making firms less willing to enter into informal dialogues with the FSA and take prompt remedial action. However, it is in firms interests to continue to have informal dialogues with the FSA even if there is a chance this information could be published. As described by the FSA, formal action can be a more lengthy process and it would be in both the FSA and firms interests to resolve situations quickly. Whilst the FSA would prefer to use its informal powers, the FSA does have formal powers to require firms to co-operate which can be used if necessary. The Commissioner also notes that the argument the FSA put forward does not demonstrate a prejudice to its commercial interests but to its ability to have open dialogue which impact on its role as a regulator. However, as mentioned previously the FSA has formal powers which it can use at any time to enforce its regulatory powers.
28. The Commissioner also regards that disclosure of information surrounding firms' informal discussions with the FSA to resolve a situation may actually increase public confidence in a firm and in the FSA as it demonstrates a willingness to rectify problems. Additionally, the Commissioner notes that in this case formal

action was taken and the final notice of April 2003 is in the public domain. The Commissioner also notes that the FSA has no financial interest in this matter.

29. The Commissioner has considered the Tribunal decision EA/2005/005 *'John Connor Press Associates vs. The Information Commissioner'*. The tribunal interpreted the exemption at section 43 to mean that the chance of prejudice must be more than a hypothetical or remote possibility; there must be a real or significant risk. This was further expanded in the Tribunal decision *Hogan vs. The Information Commissioner EA/2005/0026 and Bexley vs. The Information Commissioner EA/2006/0060*. In these cases the Tribunal considered what was meant by "would be likely to prejudice" and when a prejudice based exemption might apply: that 'prejudice must be real, actual and of substance' and that 'the occurrence of prejudice to the specified interests is more probable than not and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not'
30. In determining if the risk of prejudice fits this criteria the Commissioner has taken into account the information already in the public domain and the considerations the FSA had to give before publishing this, the time elapsed since the initial publication of the final notice and the possibility that further publication could create new uncertainty for Lincoln. Whilst the Commissioner acknowledges that there is a possibility that further prejudice could occur he does not find that this is significant but concludes that any real risk to prejudice would have occurred at the publication of the final notice.
31. For these reasons the Commissioner finds that section 43 is not engaged as the FSA has not demonstrated that disclosure of the information would or would be likely to prejudice the firms or the FSA's commercial interests.

Exemption - Section 44 Prohibitions on Disclosure.

32. Section 44 provides that information is exempt if its disclosure by the public authority is prohibited under any enactment. The FSA has found that the prohibition engaged is sections 348 and 391 of the Financial Services and Markets Act.
33. Section 348 of the Financial Services and Markets Act (FSMA) provides that confidential information must not be disclosed by the FSA without consent. In order to establish if the information is covered by the statutory bar the Commissioner must consider the following: is the information confidential under the terms of the FSMA; has consent been given; has the information already been disclosed to the public and could the information be provided in the form of a summary so it is not possible to ascertain to whom the information relates.
34. The Commissioner first set out to establish if, for the purposes of section 348 of the FSMA, the information is confidential information. Confidential information as defined by section 348 must have been obtained by the FSA as part of its functions as the regulatory body overseeing the financial services industry and be information which relates to the business or other affairs of any person. The legal definition of 'person' includes corporations and limited companies.

35. The FSA explained that it was the primary recipient of the information which was obtained by the FSA in order to monitor the Lincoln Assurance Limited review of Maximum Investment Plans in discharge of its supervisory and enforcement functions under the FSMA.
36. The Commissioner is therefore satisfied that the information in question was confidential information obtained by the FSA for the purpose of discharging its functions as the regulator of the financial services industry.
37. Section 348 (1) states that confidential information must not be disclosed without the consent of the person from whom the information was obtained from or if different to whom the information relates. The FSA have approached Lincoln to see if consent to disclosure the information could be obtained. In their response Lincoln indicated that they were strongly apposed to any of the requested information being disclosed.
38. Section 348 (4) allows that information is not confidential if it has already been disclosed to the public or is in the form of a summary or collection of information framed so that it is not possible to ascertain information relating to a particular person. Although the Final Notice was published in April 2003, none of the information requested has been made available to the public and where section 44 has been applied it is possible to identify the person to whom the information relates.
39. Section 349 of the FSMA states that section 348 does not prevent disclosure of confidential information which is made for the purpose of the carrying out of a public function and permitted by regulations made by the Treasury under this section. In the recent Information Tribunal decision EA/2005/0019 '*Slann vs. Financial Services Authority*' the tribunal found that the term public functions related to powers conferred on the FSA by legislation and not legislation such as FOIA, to which it was subject. Therefore making a disclosure under FOI was not carrying out a public function.
40. The Commissioner therefore finds that the information is covered by section 348 of the FSMA and that section 44 of the Act is engaged where applied. As section 348 has been applied in conjunction with section 391 of the FSMA, the Commissioner has not considered the additional statutory prohibition of section 391 as put forward by the FSA. Section 44 is an absolute exemption and therefore there is no requirement to consider the public interest test.

The Decision

41. 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:
 - i. The application of section 44 of the Act.

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

- i. The application of section 43 of the Act.

Steps Required

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

- i. Disclose the information withheld solely by virtue of section 43.

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

Failure to comply

45. 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.

Right of Appeal

46. 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@dca.gsi.gov.uk

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 4th day of June 2007

Signed

Steve Wood
Assistant Commissioner

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

Legal Annex

General Right of Access

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”.”

Effect of Exemptions

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

- (a) the provision confers absolute exemption, or
- (b) 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 public authority holds the information

section 1(1)(a) does not apply.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 2(3) provides that –

“For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
- (g) section 41, and
- (h) section 44”

Commercial interests

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).”

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.”