

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 24 July 2007

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

### Summary

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The complainant requested information related to the investigation of possible insider trading leading up to September 11 2001. The FSA withheld the information under section 44 and section 12. The Commissioner investigated the application of the two exemptions and found that section 44 was engaged and upheld the FSA's assertion that to provide some of the information would exceed the appropriate cost limit. The Commissioner found that in failing to inform the complainant of its reliance on section 12 in the refusal notice the FSA was in breach of section 17 of the Act.

### The Commissioner's Role

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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

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2. The Complainant has advised that on 14 November 2005 she requested the following information from the Financial Services Authority (FSA):

*"Please could you supply me with all documentation pertaining to the investigation which was carried out into large-scale insider trading in August and September 2001. The investigation was initiated by the US authorities after 11 September 2001 to look into insider trading connected to the attacks in the USA. The UK investigation took place between September 2001 and 2003."*

3. On the 17 November 2005 FSA responded asking for clarification of the request, specifically for the name of the person or persons investigated and the name of the companies whose shares were the subject of the investigation.
4. The complainant responded on 24 November 2005 enclosing a list of all the companies the information should relate to.
5. On the 19 December 2005 FSA provided a substantive response to the complainant confirming it held the information requested and enclosing most of the information. However the FSA stated that some of the information was exempt from disclosure by virtue of sections 44 'Prohibitions on disclosure', 41 'Information provided in confidence', and section 40 'personal information'. The FSA stated that section 348 of the Financial Services and Markets Act prohibited disclosure of confidential information obtained by the FSA pursuant to its functions under that Act.
6. The complainant requested an internal review of the decision on 12 January 2006 which was acknowledged by FSA on the 17 January 2006.
7. The FSA completed its internal review and communicated the findings to the complainant on the 9 February 2006. The outcome of the review found that there was a further document which could be disclosed to the complainant but the remainder of the information was still exempt under section 40, 41 and 44. The FSA also explained that much of the information consisted of transaction reports which are only held on back up tapes. The FSA stated that whilst it was possible to redact these to enable disclosure, to re-configure the system and retrieve the reports from the system would exceed the appropriate costs limit. The FSA also mentioned that further time that would have to be spent on redacting the information.

## **The Investigation**

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### **Scope of the case**

8. On 10 April 2006 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider all the exemptions applied and also the assertion by the FSA that to obtain the information from the back up tapes would exceed the appropriate cost limit.

### **Chronology**

9. The Commissioner began his investigation by writing to the FSA on 26 January 2007 requesting further explanation regarding the calculation of the cost limit, further clarification regarding the application of each of the exemption and a copy of the information being withheld.

10. The FSA responded on 23 February 2007 enclosing a copy and index of the information withheld, annotated to show where each exemption applies. The FSA stated that on reviewing the application of sections 41 and 44 they now considered that the information withheld under 41 should have been withheld under 44. The Commissioner focused his investigation on the application of section 44, as if applied correctly there is no requirement to consider the application of sections 40 and 41. In addition the FSA found there was further information which could now be released. The FSA showed that section 40 had been applied to the name of an individual contained within the documents as well as demonstrating how obtaining the transaction reports, at the time the request was made, would have exceeded the appropriate cost limit.
11. On 28 February 2007 the Commissioner replied to the FSA asking the FSA to confirm that apart from the sections marked all the information disclosed to the Commissioner had also been disclosed to the complainant.
12. The FSA responded on 14 March 2007 confirming that the complainant had received all the information disclosed to the Commissioner apart from those sections marked and offering further explanation regarding the cost limit calculations.
13. On 22 March 2007 the Commissioner wrote again to the FSA to ask if it would now be possible to supply the transaction reports within the cost limits. The FSA replied on 11 April 2007 confirming that it would be possible to do so, as since the request was made a new server had been purchased, and that it was working internally on the process of restoring the data, and provide the complainant with the redacted information (the redaction necessary under section 44).
14. On 27 April 2007 the FSA wrote again explaining that it had recalled the box holding the back-up tapes and had been unable to locate the tapes, the FSA explained its record management policy to the Commissioner and that it was still trying to establish if the information had been backed up elsewhere in a different format. The FSA replied again on the 1 June 2007 confirming that the FSA also creates a monthly back-up or extraction of the transaction reports, and therefore it did hold the information at the time of the request. The FSA stated it had attempted to restore the wider back up but that the server capacity was still insufficient to do so and therefore the cost limit still applied. The FSA explained that whilst it had purchased a new server that it would need another new server to re-create the information from the wide back up of the system and therefore the original explanation of the cost limit applied.

### **Findings of fact**

15. The information withheld under section 44 consists of two pages withheld in their entirety, three pages redacted of certain names and a redacted email.
16. The information withheld under section 12 consists of transaction reports for three weeks worth of trading, the transaction reports are currently held on back up tapes.

## Analysis

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### Procedural matters - Section 12 'Cost Limit'

17. Section 12 of the Act does oblige a public authority to comply with a request if the authority estimates the cost of complying with the request would exceed the appropriate limit. The FSA stated that to obtain the information requested in points one and two of the complainant's request would exceed the appropriate limit as set out in the Appropriate Limit and Fees Regulations 2004. These regulations set a limit of £450 to the cost of complying with a request for all public authorities subject to the Act not listed Schedule 1 .part I. In estimating the cost of complying a public authority can take the following into account:
- determining whether it holds the information requested,
  - locating the information or documents containing the information,
  - retrieving such information or documents, and
  - extracting the information from the document containing it.

The Regulations state: *'any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour'*.

18. The information being withheld under the cost limit is the transaction reports for three weeks worth of trading. The FSA explained that the reports are no longer held on the 'live' computer system but are held on a back up of the wider systems, the restoration of which would require its current computer system to be re-configured to match that existing at the time the reports were prepared.
19. On further clarification the FSA explained that in order to restore the back up tapes at the time of the request, the FSA would have needed to purchase a new server as the FSA did not have the server capacity to hold the restored data. The FSA provided the Commissioner with a breakdown of the estimated costs of the time spent purchasing, installing and restoring and extracting the data. The estimated costs (without considering redaction) exceeded £450.
20. The Commissioner is satisfied that to provide the complainant with the transaction reports would, at the time the request was made, have exceeded the appropriate limits. The Commissioner notes that the subsequent efforts to extract the transaction reports in light of a change in the IT capabilities of the FSA, was done in the spirit of informal resolution.

### Section 17 – Refusal of request

21. Section 17(5) states that a public authority which is relying on a claim that section 12 or 14 applies must within the time for complying with section 1(1) give the applicant a notice stating that fact.

22. In the refusal notice issued by the FSA on 19 December 2005 the FSA did not mention its reliance on the application of section 12 in relation to the transaction reports. The FSA only informed the applicant of its reliance on section 12 following the complainant's request for an internal review and its response on the 9 February 2005.
23. The Commissioner finds that in failing to inform the applicant that it was relying on section 12 to withhold some of the information requested in the refusal notice issued on 19 December 2005 the FSA was in breach of the requirements of section 17(5) of the Act.

#### **Exemptions - Section 44 'Prohibitions on Disclosure'**

24. Section 44 provides that information is exempt if its disclosure by the public authority is prohibited under any enactment.
25. 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.
26. 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 received 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.
27. The FSA explained that the information was obtained to enable the FSA to monitor movements in the shares listed on the UK exchanges, to ascertain whether an inquiry as to whether 'market abuse' has taken place under part VIII FMSA. The information redacted from the documents constitutes firms names and information from firms concerning whether or not market abuse had occurred.
28. The Commissioner is therefore satisfied that the information in question was confidential information received by the FSA for the purpose of discharging its functions as the regulator of the financial services industry.
29. 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 has confirmed that consent had been considered but concluded that the firms were unlikely to give consent and the overseas regulators whilst consenting that the FSA could disclose their involvement asked that the FSA did not provide any details of their request. Section 348 (2) (a) defines 'confidential information' as information which relates to the business or other affairs of any person. Information relating to an overseas regulator would fall within this definition.

30. 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. The information requested has not already been disclosed to the public and where section 44 has been applied it is possible to identify the person to whom the information relates.
21. 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 '*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.
32. 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 44 is an absolute exemption there is no requirement to consider the public interest test.
30. There is no requirement to consider the application of section 41 and 40 as they have been applied in conjunction with section 44.

## The Decision

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33. 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: The application of section 44; and the application of section 12 to the withheld information.
34. However, the Commissioner has also found that in failing to inform the applicant that it was relying on section 12 to withhold some of the information the public authority was in breach of section 17(5) of the Act.

## Steps Required

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35. The Commissioner requires no steps to be taken.

## Right of Appeal

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34. 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](mailto: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 24<sup>th</sup> day of July 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”.”

### **Exemption where cost of compliance exceeds appropriate limit**

**Section 12(1)** provides that –

“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.”

**Section 12(2)** provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

**Section 12(3)** provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

**Section 12(4)** provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

**Section 12(5)** – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

### **Refusal of Request**

**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(2)** states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

**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 17(4)** provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5)** provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

## **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.”

**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).”

## **Section 348 of Financial Services and Markets Act**

348. - (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.