

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 October 2012

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

Decision (including any steps ordered)

1. The complainant has requested from the Financial Services Authority (FSA) information relating to the circumstances in which a company ceased to be regulated. The FSA confirmed it held information covered by the request but considered it exempt from disclosure under section 44 of FOIA by virtue of section 348 of the Financial Services and Markets Act 2000 (FSMA).
2. The Commissioner's decision is that section 348 of the FSMA does provide a statutory bar to disclosure and therefore section 44 of FOIA was correctly applied by the FSA. He does not therefore require the FSA to take any steps as a result of this notice.

Request and response

3. On 24 February 2012 the complainant wrote to the FSA and requested information in the following terms:

"Why; and for what reason/reasons, did Capita Trust Company Ltd [Capita] cease to be Regulated and therefore Authorised by the FSA?"

Please supply brief relevant documentation summarising the fact and circumstances of this deregulation."

4. The FSA responded on 22 March 2012. It confirmed that it held the requested information but considered this to be exempt information on the basis that section 44 of FOIA applied by virtue of the prohibition on disclosure set out at section 348 of the FSMA.

5. The complainant wrote to the FSA again on 27 March 2012 challenging its refusal of his request. The FSA subsequently carried out an internal review, the outcome of which was provided to the complainant on 23 April 2012. This upheld the FSA's original position.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, the complainant disagreed with the FSA's refusal to disclose the information he had described.
7. The Commissioner notes that he has not had sight of the withheld information, finding it possible to make a decision on the basis of the submissions put before him.

Reasons for decision

8. Section 44(1)(a) of FOIA states that information is exempt if its disclosure is prohibited by or under any enactment. The FSA has claimed that the request is for 'confidential information', the release of which under FOIA is prevented by section 348 of the FSMA.
9. Section 348(1) of the FSMA states that –
“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.*
10. Put simply, the operation of the statutory bar is dependent on the consideration of the following issues; firstly, whether the FSA can be classified as a primary recipient, secondly, whether the request is for 'confidential information' and if so, thirdly, whether there is consent to the release of the information or whether this could be obtained.

Is the FSA a primary recipient?

11. A primary recipient is defined at section 348(5) of the FSMA and includes the FSA. The Commissioner therefore accepts that the FSA is a primary recipient for the purposes of the FSMA.

Is the request for confidential information?

12. The FSMA defines 'confidential information' at section 348(2). This describes it as information which relates to the business or other affair of any person and was received by the primary recipient for the purposes of, or in the discharge of, its functions and is not prevented from being confidential.
13. Breaking down the components of the definition, the Commissioner must consider the following questions when seeking to establish whether information is 'confidential' –
 - Does the information relate to the business or other affairs of any person?
 - Was the information received by the primary recipient for the purposes of, or in the discharge of, its functions?
 - Has the information already been made legitimately available to the public?
 - Can the information be anonymised?
14. The Commissioner has first considered if the information relates to the business or affairs of another person. A person is not defined in FOIA, thus the Commissioner has adopted the usual legal interpretation of a person, namely any entity that is recognised as having legal personality to enter into legal relations.
15. The Commissioner is satisfied that the information does relate to the business or affairs of another person, in this case Capita. He has therefore gone on to consider whether the information was received by the FSA for the purposes of, or in the discharge of, any of its functions.
16. Section 348(3) of the FSMA clarifies that for information to be confidential information it does not matter whether the information was received by order of a requirement to provide it under the FSMA. As demonstrated by his decision on FS50438560¹, it is the Commissioner's view that it does not matter if information was provided voluntarily to the FSA or under compulsion. The key issue is whether the FSA can demonstrate the function it was discharging when it received the report.

¹ http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50438560.ashx

17. The FSMA has explained that it is concerned with the regulation of financial services and markets in the UK. Under section 19 of the FSMA, any person who carries on a regulated activity in the UK must be authorised by the FSA or be exempt from this requirement. For each regulated activity an 'authorised person' must also identify with which investment type their activities will be concerned. A permission given by the FSA or having effect if so given is referred to in the FSMA as 'a Part IV permission'.
18. The FSA states that the information requested by the complainant was only received from Capita in observance of the FSA's role as the regulator of authorised persons. On this explanation, the Commissioner is content that the FSA was fulfilling a regulatory function by receiving the information. While this may be the case, however, section 348(4) also states that information may not be deemed confidential information under the FSMA if it has legitimately made available to the public or it can be anonymised.
19. The Commissioner considers that information will only have been legitimately made available where it has already been placed in the public domain without breaching the FSMA. There is no indication that this has occurred here.
20. Section 348(4) of the FSMA additionally stipulates that information cannot be confidential information if it can be summarised or so framed that it is not possible to ascertain from it information relating to any particular person. The Commissioner does not consider this to be a relevant consideration in this case. This is because the direction of the request itself, which makes Capita its subject, removes the possibility of making the information anonymous.
21. For the reasons outlined above, the Commissioner has determined that the information is confidential information pursuant to section 348(2) of the FSMA.

If it is confidential information is there consent to its release or can this be obtained?

22. The FSMA allows that information may be disclosed if consent has been received from the person that provided the FSA with the information, in this case Capita.
23. The Commissioner understands that Capita has not given its consent to the release of the requested information. As such, he considers that the information remains confidential information for the purposes of the statutory bar provided by section 348 of the FSMA. The FSA was

therefore correct to rely on section 44 of FOIA to withhold the requested information.

24. While this issue has not been raised in this case, the Commissioner notes that in making his finding he has also considered whether there are other gateways contained in the FSMA that could be used to facilitate disclosure. In particular, section 349 of the FSMA provides an exception to the section 348 statutory bar. Consistent with the approach taken on FS50438560, however, the Commissioner considers that section 349 gives the FSA the power, but not a duty, to disclose. Consequently, this issue is not felt to have a bearing on the consideration of whether the FSA was entitled to apply section 44 of FOIA.

Right of appeal

25. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. 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.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Rachael Cragg
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Wycliffe House
Water Lane
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