

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 March 2015

**Public Authority:** Financial Conduct Authority  
**Address:** 25 The North Colonnade  
Canary Wharf  
London, E14 5HS

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about which company supplied indemnity cover to the [named company] during the period of 2009 and 2010. The Financial Conduct Authority (FCA) refused to provide the requested information under section 44(1)(a) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the FCA correctly applied section 44(1)(a) FOIA in this case.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 28 October 2014 the complainant requested information of the following description:  
  
"I would like details of which company supplied indemnity cover to the limited company (named company), the period of 2009 and 2010. I understand cover was in place and the Information Commissioner's Office tells me I can ask you to supply me with such information."
5. On 21 November 2014 the FCA responded. It refused to provide the requested information under section 44(1)(a) FOIA.

6. The complainant requested an internal review on 28 November 2014. The FCA sent the outcome of its internal review on 30 December 2014. It upheld its original position.

## Scope of the case

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7. The complainant contacted the Commissioner on 13 January 2015 to complain about the way her request for information had been handled.
8. The Commissioner has considered whether the FCA was correct to apply the exemption cited.

## Reasons for decision

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### Section 44(2)

9. Section 44 FOIA provides that
  - “(1) 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.
  - (2) 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).”
10. The FCA has explained that section 44(1)(a) exempts information from disclosure if its disclosure is prohibited by any other enactment or rule of law.
11. The FCA has claimed that the request is for ‘confidential information’, and if it were held, the release of which under FOIA is prevented by section 348 of the FSMA.
12. 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.*

13. The operation of the statutory bar is dependent on the consideration of the following issues; firstly, whether the FCA 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 disclosure or whether this could be obtained.

*Is the FCA a primary recipient?*

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

*Is the request for confidential information?*

15. 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.
16. 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?
17. The Commissioner has first considered if the information, if held, 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.

18. The Commissioner is satisfied that the information relates to the business or affairs of another person, in this case [named company]. He has therefore gone on to consider whether the information if held was received by the FCA for the purposes of, or in the discharge of, any of its functions.
19. The FCA has explained that during the time period of the request [named company] was required to hold Professional Indemnity Insurance (PII). It explained that PII requirements for firms carrying out insurance and home finance intermediation are set out in Chapter 3.2 of the Prudential Sourcebook for Mortgage and Home Finance Firms, and Insurance Intermediaries (MIPRU). It said therefore that the information requested does relate to the business affairs of [named company] and was provided to the FCA for the purposes of or in the discharge of the FCA's functions under the FSMA. It said that those functions were for the monitoring of compliance with its regulatory requirements, here whether [named company] was maintaining a Professional Indemnity Insurance as required by MIPRU.
20. The Commissioner is content that the FCA was provided with the requested information in order to fulfil its regulatory functions as described above.
21. Section 348(4) FSMA also states that information may not be deemed confidential information if it has been legitimately made available to the public or it can be anonymised.
22. The Commissioner considers that the information will only have been legitimately made available where it has already been placed into the public domain without breaching the FSMA. There is no indication that this has occurred.
23. 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 the named company its subject, removes the possibility of making the information, if held, anonymous.
24. For the reasons outlined above, the Commissioner has determined that the information, if held, 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?*

25. The FSMA explained that it did endeavour to obtain consent to disclosure, however the company that provided the PII refused consent and the [named company] did not respond to the FCA's request for consent.

26. At paragraph 36 of the Tribunal's decision in the case of Norman Slann and the Information Commissioner and the FSA<sup>1</sup>, the Judgement states:

*Failure to obtain consent necessarily engaged the prohibition in section 348(1) of the FSMA.*

27. The Commissioner considers that the requested information, if held remains confidential information for the purposes of the statutory bar provided by section 348 of the FSMA. The Commissioner therefore considers that the requested information is exempt by virtue of section 44(1)(a) FOIA.

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<sup>1</sup> EA/2005/0019

## Right of appeal

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28. 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: 0870 739 5836

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

29. 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.
30. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**