

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 7 August 2007**

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

### Summary

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The complainant requested the names of firms which the FSA viewed as failing to handle mortgage endowment complaints to the required standard and the extent to which they were doing so. The Commissioner investigated and found that no such list was held, but did find that the FSA held a list of firms which had generated a disproportionate number of mortgage endowment complaints. The Commissioner's decision is that the FSA breached section 1 of the Act as it failed explain to the complainant that information of the type requested was not held.

### 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 7 January 2005 he made the following request for information from the Financial Services Authority (FSA):

*"I am writing under the Freedom of Information Act 2000 to ask for the names of the firms which in the FSA's view are failing to meet the required standards in handling mortgage endowment complaints and the extent to which they are doing so. I am also asking for the names of those firms which in the FSA's view are meeting all those standards"*

3. The FSA responded to the request on 3 February 2005 confirming that it held information relevant to the complainant's request but refusing to disclose that information. The FSA stated that either section 30 'Investigations and Proceedings conducted by a public authority' or 31 'Law enforcement' applied as well as section 43 'Commercial Interest'. The FSA argued that it is in the public interest that the FSA has open and candid exchanges with its firms and that disclosure could make firms less willing to engage in dialogue and take prompt remedial action.
4. On 11 February 2005 the complainant requested an internal review of this decision.
5. The FSA completed an internal review and responded to the complainant. The review clarified with the complainant that the requested information asked for the names which in the FSA's 'view' were failing to meet the required standards.
6. The FSA's finding in the internal review was that the information held was still exempt from disclosure. However the FSA had reviewed its application of the exemptions and now found that section 30 was not valid and that the exemptions applied should have been 31 and 43.

## The Complaint

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8. On 27 September 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the application of the two exemptions and the public interest test as applied.

## Chronology

9. The Commissioner began his investigation on 15 February 2007 by writing to the FSA requesting further clarification regarding the application of the exemptions, an expansion on the public interest arguments considered and a copy of the information being withheld. An extensive correspondence followed until mid-June 2007, in the course of which FSA put forward arguments supporting the application of various exemptions to information which it did hold. Samples of such information were supplied to the Commissioner, but – as elaborated below – he has now concluded that such information fell outside the scope of the request. The FSA argued in any event that such information was exempt from disclosure by virtue of sections 31, 43 and 44 of the Act. In support of the last exemption, reliance was placed by the FSA upon the Human Rights Act.
10. In the course of the correspondence, the FSA stated that it would now consider disclosing the names of four firms as they had undergone formal action.
11. In a letter of 12 June 2007, the FSA confirmed it did not have a list of the names of compliant firms; this is because it did not carry out enquiries into all firms which dealt with mortgage endowment complaints.

## Findings of fact

12. The sample of documents supplied to the Commissioner show how concerns about firms evolve and are documented over a number of years. These are based on analysis of a variety of information received from different sources and from supervisors' discussions with firms.
13. During a visit to a firm the FSA seeks to assess or re-assess the firm's business, governance and controls. The FSA state that this process is not set in stone and it could for example ask a member of a firm's staff to illustrate how they undertake a key compliance process and themes may emerge from meetings with different members of staff.
14. The FSA explained that it contacts firms regularly and as such their compliance status can vary over time; they could be broadly compliant after one visit but then could have become non-compliant on various aspects at a later date. There are a range of descriptors used by the supervisors of individual firms to describe the extent of any non-compliance. It would accordingly be difficult to provide a consistent ranking across firms as to the relative seriousness of any areas of concern at any particular time.
15. The Commissioner does not consider that any of this information falls within the scope of the request. Such information did not amount to any "view" of the FSA as such about which firms were failing to meet the required standards in handling mortgage endowment complaints or the extent to which they are doing so. The Commissioner therefore finds that the FSA does not hold the names of firms which in its view were failing to meet the required standards for handling mortgage endowment complaints.
16. The Commissioner is also satisfied that the FSA does not hold a list of firm's names which in its view are meeting the required standard in handling MEC.

## Section 1: General Right of Access.

17. Section 1 provides that any person making request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and have that information communicated to him. The Commissioner first sought to establish if the FSA held information of the type requested.
18. During the course of the investigation it became clear that the FSA does hold a list of firms which identified firms which were generating a disproportionate number of mortgage endowment complaints (MEC). This was based on material of which the FSA was made aware from the Financial Ombudsman Service, complaint handlers, MPs' letters and FSA supervisors. The list was referred to in a 'Dear CEO' letter from the FSA. A Dear CEO letter is a regulatory tool with which the FSA can make the regulated community aware of important issues immediately and work with them to take action.

19. It is clear to the Commissioner that the information which led to the letter had been collated from a number of different sources. It had not been verified by the FSA's formal processes and cannot be said to identify names of firms which FSA "viewed" as "failing to meet the required standards in handling mortgage endowment complaints [or] the extent to which they are doing so".
20. The Commissioner considers that the FSA should have drawn this distinction at the time of the request which would have led to the conclusion that information was not held which fell within the scope of the request. The Commissioner believes that there is a clear and valid distinction between the names of firms which, in the FSA's view are failing to meet the required standards in handling mortgage endowment complaint, and those which the FSA has been made aware were generating a disproportionate number of complaints. For example, it is possible a firm could generate very few complaints but could deal with them poorly or generate a large number and handle the complaints within the required standards.
21. The Commissioner considers that the FSA should have explained in its refusal notice or at the internal review, that it did not hold information in the terms requested. In failing to explain that the information requested was not held the FSA did not deal with the request in accordance with the requirements of part 1 of the Act.

## **The Decision**

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22. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

## **Steps Required**

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23. The Commissioner requires no steps to be taken.

## **Other matters**

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24. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter.
25. If the complainant were to make a modified request for a list of firms which generated a disproportionate number of mortgage endowment complaints as set out in the "Dear CEO" letter, the Commissioner's decision in Case reference FS50075781 will be relevant to the decision as to whether disclosure of this list should be made.

26. It is of course open to the FSA to disclose this list to the complainant without waiting for a further request..

## Right of Appeal

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64. 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

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 7<sup>th</sup> day of August 2007**

**Signed .....**

**Richard Thomas  
Information 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”.”