

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 September 2007

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

Summary

The Complainant requested the letter sent by the FSA to Tony Blair following the Prime Minister's speech of June 2005. The FSA refused to disclose the information under section 31 and 36 of the Act, in applying the public interest test the FSA concluded that the public interest lay in maintaining the exemption. The Commissioner investigated the FSA's application of the exemptions and found that the exemption at section 31 of the Act was not engaged. The Commissioner found that the exemption at section 36 of the Act was engaged and that the public interest favoured maintaining the exemption.

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 has advised that on 7 June 2005 he made the following request for information to the Financial Services Authority (FSA):

*"In recent press articles it has been disclosed that Mr Callum McCarthy wrote a 'private letter' to Mr Tony Blair requesting evidence on various aspects of the operation of the FSA
1....Please supply me a copy of this letter."*

3. The FSA responded to the complainant on 1 July 2005 confirming that it held information relevant to the request and informing the complainant that it

considered that section 36 'Prejudice to the effective conduct of public affairs' may apply. The FSA then informed the complainant that it required more time to consider the public interest test.

4. On 14 July 2005 the FSA provided a substantive response to the complainant confirming that the information requested was exempt from disclosure by virtue of section 36 of the Act. This decision was not appealed by the complainant at the time of the refusal. However, on 3 July 2006 the complainant made another request for the same information to the FSA.
5. On 27 July 2006 the FSA provided a substantive response to the complainant confirming that the information requested was considered to be exempt from disclosure by virtue of section 36 of the Act. The FSA explained that it considered that in all circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosure.
6. The complainant requested an internal review of this decision on 31 July 2006, the complainant particularly asked the FSA to reconsider its decision that the public interest lay in maintaining the exemption in light of the information already in the public domain.
7. The FSA completed its internal review and communicated its findings to the complainant on 4 September 2006. The internal review upheld the original decision to withhold the information under section 36 of the Act.

The Investigation

Scope of the case

8. On 19 September 2006 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 applicability of the exemption and the public interest arguments for disclosing the information.
9. The complainant also queried the appropriateness of the Qualified Person who made the decision to refuse the information being Callum McCarthy. As noted by the FSA and the complainant there is nothing in the Act that prevents the Qualified Person being linked to or the subject of the information requested, the Commissioner does however need to be satisfied that the opinion of the qualified person is both objectively reasonable and reasonably arrived at.
10. During the course of the investigation the FSA disclosed the majority of the letter but withheld two sentences under section 31 of the Act. Given this disclosure, the Commissioner limited the scope of his investigation to the redacted sentences. This Decision Notice likewise only addresses the withheld redacted sentences.

Chronology

11. The Commissioner began his investigation by contacting the FSA on 23 March 2007. The Commissioner requested further expansion of the public interest arguments both for and against maintaining the section 36 exemption; information about when the qualified person's opinion was sought and given; and a copy of the information being withheld.
12. The FSA responded on 2 April 2007 explaining in more detail the information given to the qualified person, when this was done and when their opinion was given. The FSA also provided more information regarding the public interest arguments for maintaining the exemption.
13. On 17 May 2007 the FSA wrote again stating that it had reviewed its application of section 36 in light of the passage of time that had elapsed and recent 'case law' coming out from the Tribunal. The FSA now considered it could disclose the letter requested to the complainant subject to the redaction of two sentences to be withheld under section 31. The Commissioner asked the FSA to disclose the information it now regarded as non-exempt to the complainant.
14. On 29 May 2007, during the course of the Commissioner's investigation the FSA found that the section 36 exemption no longer necessitated withholding the information. The FSA wrote to the complainant disclosing the letters but redacted two sentences under section 31 'Law enforcement', the FSA explained why this exemption was now considered to apply.
15. On 8 June 2007 the Commissioner wrote to the FSA asking for further explanation regarding the application of section 31 and an expansion on the public interest test and enquired as to the application of section 36.
16. The FSA replied on the 22 June 2007 providing further arguments regarding its application of section 31 and confirmation that section 36 no longer applied to the whole document.

Analysis

Exemption: Section 31 'Law Enforcement'

17. Section 31(1) (g) provides that information is exempt if its disclosure would, or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2). The FSA states disclosure of the information would prejudice:
 - (a) the purpose of ascertaining whether any person has failed to comply with the law
 - (b) the purpose of ascertaining whether any person is responsible for any conduct is improper

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise; and
(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become Authorised to carry on.

18. The FSA explained that the purposes listed in 31 (2) relate to the FSA's monitoring function under the Financial Services and Markets Act (FSMA). The FSA monitors whether regulated firms are complying with any requirements imposed on them by the FSMA.
19. The FSA stated that in order to carry out this function effectively it gathers information on an on-going basis about current activities and developments in firms and on the financial markets. The FSA explained that it regularly receives information from a range of sources which provide it with the information needed in order to carry out its functions. One example of this is when the FSA receives information in confidence from the senior executives of overseas firms with a presence in the UK. This is a valuable source of intelligence on a number of matters relevant to the FSA's functions under the Financial Services and Markets Act (FSMA). It allows the FSA insights into how such firms manage their businesses globally, what their development plans are and what regulatory initiatives are underway in their 'home' jurisdictions.
20. As an example the FSA explained that it might be told in confidence by a senior executive that a firm is considering making a large acquisition or setting up a business in another country where it had not previously had a presence. This information would allow the FSA to consider on a timely basis such matters as whether the firm will have adequate financial and systems for the enlarged business after the proposed transaction and whether steps will be taken to avoid senior management overload. Information about relative regulatory approaches might assist the FSA in establishing whether there will be changes to the nature or amount of financial resources available to mitigate risks to UK consumers, or whether a firm's internal control environment may change in a way which will have an impact on how the firm does business in the UK.
21. The Commissioner is therefore satisfied that the FSA has functions in relation to section 31(2) (a,b,c and d). In order to engage the exemption the Commissioner must decide if disclosure of the information would prejudice any of these functions.
22. The Commissioner has considered the Tribunal decision EA/2005/005 *John Connor Press Associates vs. The Information Commissioner*. The Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (para 15). 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*.
23. In these cases the Tribunal considered what was meant by "would be likely to prejudice" and when a prejudice based exemption might apply. The Tribunal

- found that 'prejudice must be real, actual and of substance', it went on to explain that there are two alternative ways in which disclosure can be said to prejudice and that one of these must be shown. Where prejudice 'would be likely to occur' the likelihood need not be more probable than not, though it should be real and significant; where prejudice 'would' occur, the change should be greater – more probable than not.
24. Disclosure of such information, the FSA argues, would harm its effectiveness as regulator. The FSA states that one of its statutory functions under the FSMA is 'market confidence: maintaining confidence in the financial system'. Financial markets are global and it is important that relations with its counterparts in other countries are not in any way weakened for the FSA to meet its objectives. It is therefore important, to maintain its effectiveness to have open and candid exchange of information with overseas regulators, as well as with executives in the firms they regulate.
 25. The FSA states that if the information withheld became publicly available it would have an impact on relationships between the FSA and overseas regulators and also could impact on the overseas regulators and those they regulate. The FSA state that this would make both parties more reticent in their dealings with them. If the view of the senior executives in London about their 'home' regulatory environment, given in confidence to the FSA, became publicly available, it is possible that the 'home' regulators would consider the executives to have acted disloyally towards their 'home' interests and regulators. The FSA is concerned that the willingness of these executives to engage in an open dialogue with it would be undermined and that this would then prejudice its monitoring functions as a useful and valuable source of information would be no longer available.
 26. The Commissioner recognises the concerns of the FSA that disclosure could impact on its relations with overseas regulators, impinge on the free and candid exchange of views and therefore on its effectiveness as a regulator. However, the Commissioner does not consider that any of these arguments directly relate to a prejudice to any of the functions in section 31(2)(a),(b),(c) and (d). The Commissioner has viewed the information redacted from the letter and has considered its content. The information withheld comprises two sentences. No person or firm is identified specifically in these sentences. This, the Commissioner finds, weakens any argument of potential prejudice.
 27. The FSA states that the 'home' regulators could view the executives as being disloyal towards 'home' interests and this could in the future make the executive less willing to engage in future dialogue. This argument would have more weight if the senior executives were named but in this case no references within the sentences reveal the identity of those commenting.
 28. The Commissioner has also considered the information already disclosed in the remainder of the letter. In the same paragraph as the redacted sentences, Sir Callum McCarthy discusses the regulatory systems within other countries, referring to them by name. This is also discussed in the preceding paragraph with a reference to international firms comparing their experiences of the UK and other

named countries' regulatory bodies, stating that the UK emerges more favourably.

29. Having taken account of all the arguments advanced and having considered the withheld information in the context of the information already disclosed, the Commissioner finds that the exemption at section 31(1) (g) is not engaged as disclosure would not prejudice one of the functions at 31(2).
30. Because the Commissioner has concluded that the exemption claimed is not engaged he has not gone on to consider the application of the public interest test.

Exemption: Section 36 'Prejudice to effective conduct of public affairs'

31. Subsequent to the release of the information the FSA sought to rely on section 31 to withhold the redacted information. However, the Commissioner considers that the concerns expressed by the FSA in relation to section 31 about disclosing information impinging on the free and frank exchange of views are far more relevant to section 36. The Commissioner has therefore gone on to consider the application of section 36 to the redacted sentences.
32. Section 36(2) (b) and (c) provides that information is exempt if disclosure would, or would be likely to inhibit the free and frank provision of advice; or the free and frank exchange of views for the purposes of deliberation or would otherwise prejudice, or would be likely to prejudice the effective conduct of public affairs.
33. Information can only be exempt by virtue of section 36 if 'in the reasonable opinion of a qualified person' disclosure would be likely to lead to the above adverse consequences. In order to satisfy himself that the exemption is engaged the Commissioner must:
 - Establish that an opinion was given
 - Ascertain who is the qualified person or persons
 - Ascertain when the opinion was given
 - Consider whether the opinion was objectively reasonable and reasonably arrived at.
34. The qualified person for the original refusal was Callum McCarthy, Chairman of the FSA. A qualified person referral pack was sent to him on the 18 July 2006 and on the 21 July 2006 he confirmed that he was content for the reasons laid out in the referral pack that the information was exempt under section 36 and that the public interest lay in maintaining the exemption.
35. The referral pack sent to the qualified person consists of the following information:
 - A copy of the original request
 - A copy of the information withheld
 - A referral form setting out the key points of the request and the key reasons for supporting the application of section 36.
 - Any legal advice
 - The views of the business area within the FSA that holds the information

- Arguments relating to the balance of the public interest test
 - The issue on which a decision is required.
36. Dame Deirdre Hutton conducted the internal review. Although in this case the FSA have used a separate qualified person to conduct the internal review, this is not a requirement under the Act, the Commissioner also acknowledges that most public authorities would not have two qualified person's to call upon. The referral pack was sent to her for her consideration on the 10 August 2006 and she confirmed on the 10 August 2006 that section 36 applied. The Commissioner is therefore satisfied that in this case a qualified person's opinion was properly sought and given, satisfying the first three arms of the exemption.
37. The information contained within the two sentences discloses the opinions of senior officials in the financial industry regarding the comparative state of the regulatory systems of the US and the UK. The wording makes it clear that these opinions were given with clear and explicit expectation of confidentiality.
35. The FSA has explained that the it needs to have open and uninhibited relationships with senior figures within the financial services industry in order to discharge its functions effectively. Public disclosure of information given with a clear expectation of confidentiality would harm this open relationship. Exchanges between the FSA and the other figures within the financial services industry would otherwise become cautious, which would have an adverse impact on the FSA's ability to fulfil its statutory functions.
39. The FSA state that it is in its interests to have open and candid exchanges of information with international non-regulated (by the FSA) firms and disclosure is likely to undermine their willingness to engage in a dialogue with the FSA and provide information which the FSA may require to carry out its functions effectively.
40. The Commissioner is satisfied that the opinion of the qualified person is, both objectively reasonable and reasonably arrived at and that the exemption under section 36 is therefore engaged. It therefore falls to the Commissioner to consider the public interest arguments in either maintaining or disclosing the requested information.

Public Interest Test

41. In applying the public interest test, the FSA considers that the arguments for maintaining the exemption outweigh those for disclosure. The FSA argue that it is in the public interest that the FSA continues to be able to have open and candid exchanges of view with the international financial services community and that protecting the exchanges was considered to be of greater public interest than disclosure. The FSA also state that there is a strong public interest in allowing the FSA to function effectively both domestically and internationally and disclosure could prejudice its ability to do so.
42. The FSA acknowledge that it is generally in the public interest for the public to see whether and if so how the FSA responds to comments made publicly by

others on such matters as efficiency and effectiveness of regulation. In this case the Prime Minister spoke publicly about the FSA and as the majority of the FSA's reply has been disclosed; disclosure of the whole letter would give the public the full picture and not take information already released out of context.

43. The FSA also argue that omission of the sentences does not affect the sense or the points made in the letter. They state that disclosure would prejudice its relations with overseas regulators in that they could become suspicious of its motives and see the FSA as a competitor and be less willing to collaborate. The FSA state that this would affect a number of different work streams including work to reduce financial crime.
44. The Commissioner recognises the importance placed on the free and frank exchange of views between the FSA and senior figures within the business world. This is important to enable the FSA to continue to have an accurate and up to date picture of the regulated financial services community both nationally and internationally. The FSA is concerned that disclosure would undermine this open dialogue and reduce the level of co-operation with overseas regulators.
45. The Commissioner has also considered the arguments put forward by the complainant for disclosure of the information. The complainant in his letter requesting an internal review, emphasised that it was clearly in the public interest for the public to know the full rebuttal by the FSA to the charges laid against the FSA in the Prime Minister's speech. He points out that the FSA has been strongly criticised and any further information which may come to light cannot be taken out of context and there is a strong public interest in allowing the public to see the FSA's position which could increase the public's faith in the regulator of which the Prime Minister's statement can only have damaged.
46. The Commissioner has considered the public interest arguments put forward by both parties. In reaching his decision the Commissioner has considered closely the wording of the information contained within the two sentences and finds that the opinions expressed to the Chairman of the FSA by senior figures within the financial services industry were clearly given with an expectation of confidentiality.
47. It is clearly in the public interest for the FSA to be able to continue to have open and frank discussions with domestic and international figures within the financial services industry to enable it to carry out its functions effectively. The Commissioner agrees that disclosure of information given with a clear expectation of confidentiality would harm the FSA's relationship with international firms and their regulators and undermine their willingness to engage in future open dialogues with the FSA. The Commissioner finds that the public interest in withholding the two sentences under section 36 outweighs the public interest in disclosure of the information.

The Decision

48. 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 36 to the redacted sentences.

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

ii. The application of section 31 to the redacted sentences.

Steps Required

50. The Commissioner requires no steps to be taken

Right of Appeal

51. 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 20th day of September 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

Section 31(2) provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,

- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."

Section 31(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 any of the matters mentioned in subsection (1).”