

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 April 2008

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

Summary

The complainant made two requests for information to the Financial Services Authority (FSA) for information relating to a managing agency, his syndicate and Lloyd's. The FSA refused to disclose the information requested in the first request under section 12 of the Act and the information requested in the second request under sections 44, 43, 40 and 31 of the Act.

The Commissioner investigated and found that the FSA were correct to rely on section 12 to withhold the information requested in the first request. In relation to the second request the Commissioner has found that sections 44 and 40 are engaged but that sections 43 and 31 are not. The Commissioner requires the FSA to disclose the information withheld under sections 43 and 31 within 35 calendar days of this notice.

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 20 October 2005 he made the following request for information to the Financial Services Authority (FSA):

"The request for information deals with the affairs of Riverstone Managing Agency Ltd. (formerly: Kingsmead Underwriting Agency Ltd.), the Lloyds Managing Agent of aviation syndicate 271 (Pearson)."

On October 1 2003, Mr X of Kingsmead sent a letter to Mr Y of FSA's Insurance Firms Division; and on October 17 2003 a presentation was given by Kingsmead / Riverstone to the FSA. This correspondence related to a scheme to reinsure to close syndicate 271.

I should be grateful if you would kindly take steps to identify and disclose to me the information held by the FSA relating to this transaction."

3. The FSA responded on 18 November 2005 explaining to the complainant that it is not obliged to comply with requests under the Act if the costs of doing so exceed the appropriate cost limit as set out in the Appropriate Cost Limit and Fees regulations. This sets a limit of £450 at a rate of £25 per person per hour. The FSA stated that it had already exceeded the cost limit in retrieving all the relevant material and it had not yet reviewed this to edit it and take out irrelevant or exempt information. The FSA explained that the information was therefore exempt under section 12 of the Act 'Exemption where cost of compliance exceeds appropriate limit'. The FSA further explained that even if section 12 did not apply the information would be exempt under section 44 'prohibitions on disclosure' and 43 'commercial interests'. The FSA explained that section 348 of the Financial Services and Markets Act (FSMA) 2000 prevented it from disclosing confidential information it has received.
4. On 29 November 2005 the complainant wrote again to the FSA making a further request for information:

"At some point in or about October 2002, Mr Thompson of Advent Underwriting Ltd informed Mr Z of the Corporation of Lloyd's that Advent would not be lodging a sum of £172m with Lloyd's as was required under its 'coming into line' solvency requirement.

This ultimatum had the effect of leaving a potential hole in the solvency of syndicates 2, 506, 271, and 2271 all of which were in run off, and syndicate 780, which was a continuing operation.

Advent was apparently permitted to maintain its underwriting capacity by the expedient of reducing Advent's risk based capital (RBC) solvency margin in respect of 2003 underwriting year. It appears that Advent had been allowed to trade at a ratio of 57%, whereas it should have been trading at a ratio of 94%.

I should, therefore be grateful to receive any documentation relation to: (1) the refusal by Advent to fund its underwriting obligations; and, (2) any documentation relating to its weakened solvency ratio.

In addition, syndicate 3500, the reinsurer of syndicate 271, was permitted to accept a total premium of £504.1m despite being capitalised at a margin of £5m. This would appear to be in breach of the 'regulatory minimum margin' (of solvency) and, again, I should be grateful if: (3) you could

arrange for me to be provided with full details of any information you hold in relation to this.

5. The complainant, in relation to this earlier request, informed the FSA that he had no wish to view a number of the documents, effectively all the contractual documentation, and provided the FSA with a list of the documents which he already had. The complainant raised a number of questions regarding the application of sections 44 and 43 to this information and asked these issues to be taken into account when considering his three information requests made on 29 November 2005.
6. The FSA responded to the information request of 29 November 2005 on 23 December 2005 explaining that following a search of its files it did not hold the information requested in parts (1) and (2) of the requested. In relation to item (3) of the request for information, related to the solvency of syndicate 3500, it confirmed it held information but refused to disclose the information under sections 40, 44 and 43 of the Act.
7. The complainant responded on 12 January 2006 requesting an internal review in relation to the decision to withhold the information request on 20 October 2005 and part (3) of the information request of 29 November 2005.
8. On 16 January 2006 the FSA replied to the complainant's letter of 29 November 2005 in relation to the questions raised on the application of sections 44 and 43. The FSA provided more detail about the application of section 44.
9. On 23 January 2006 the complainant wrote again to the FSA once more requesting an internal review of his two information requests.
10. The FSA completed its internal review and replied to the complainant on 13 March 2006. With regard to the information request of 20 October 2005 the FSA confirmed its position that to review the material held, and to edit it of irrelevant or exempt information would exceed the cost limit and that this information is therefore exempt under section 12. The FSA explained that it would normally ask a requester to refine a request in these circumstances in order to bring it within the cost limit but in this case this would not be possible. Further the FSA stated that even if it were possible the information would be exempt under sections 44 and 43 of the Act. In relation to the third information request made on 29 November 2005 the FSA confirmed that no information is held regarding (1) and (2) and that (3) is exempt under sections 40, 44 and 43 of the Act.

The Investigation

Scope of the case

11. On 13 May 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 if the FSA were correct to withhold the requested information under sections 44, 43, and 40 of the Act. In relation to his request of 29 November 2005 the complainant did not dispute that the information requested in parts (1) and (2) of this request were not held.

Chronology

12. Following a telephone conversation with the Commissioner the FSA wrote on 19 December 2006. The FSA explained that the complainant had made two information requests. The first was made on 20 October 2005 and it was unable to provide the information as it would take more than 18 hours to locate, identify and edit the information and therefore section 12 was engaged. The FSA also clarified that had the complainant been able to bring his request within the cost limit then this information would have been exempt under sections 44 and 43.
13. The FSA continued to explain that in relation to the second information request made on 29 November 2005 it was able to comply in part with the request and had supplied some information to the complainant, however, the majority of the information was considered exempt from disclosure under sections 40, 43 and 44. The FSA provided the Commissioner with a copy of the withheld information and explained that the majority of the information was withheld under section 44 as it had been received by the FSA for the purpose of carrying out its regulatory function in relation to the Lloyd's insurance market.
14. The Commissioner wrote again to the FSA on 21 December 2006 asking for clarification, within the withheld information as to where each exemption applied.
15. The FSA provided a copy of the withheld information annotated with the relevant exemption on 14 February 2007. The FSA also provided additional explanation regarding the application of sections 40, 44 and 43.
16. The Commissioner wrote again on 9 May 2007 asking further questions regarding the information and the FSA's functions with Lloyd's and its agencies.
17. The FSA replied on 17 May 2007 explaining in detail the relationship between Lloyd's and the FSA.
18. On 18 July 2007 the Commissioner wrote to the FSA requesting more evidence as to why the FSA concluded that compliance would exceed the cost limit in the complainant's first request. The Commissioner also explained that there were several more questions which he needed to ask regarding the complaint and suggested that a meeting might be more appropriate.

19. The Commissioner wrote on 3 August 2007 confirming that a meeting had been arranged for 29 August 2007 to further discuss the relationship between Lloyds and the FSA. In the letter the Commissioner highlighted the questions which required clarification at the meeting.
20. The FSA wrote on 8 August 2007 providing a breakdown as to how compliance with the first information request would exceed the cost limit. Included in this the FSA estimated it would take 41 hours to 'extract and edit' the information.
21. Following a query from the Commissioner the FSA wrote on 21 August 2007 to explain the meaning of 'extract and edit'. The FSA explained that it would need to review each page and extract and blank out or edit the information which is irrelevant or is exempt.
22. Following the meeting on 29 August 2007 the FSA wrote on 27 September 2007 to clarify a number of points. The FSA explained why some of the information was annotated as exempt under both sections 43 and 44 and provided more explanation regarding the application of section 43. The FSA also clarified that the 'background' information within the information was created by the FSA for FSA staff and almost all of this information would have been 'received' from the firm. This information has not been made available to the public. The FSA also explained that if any of the section 44 exempt information was available to the complainant because of his status as a Name and part of the syndicate run by Riverstone it would be covered by section 21. The FSA confirmed it did not know what information the complainant had access to therefore it applied sections 40, 44 and 43.
23. The FSA wrote again on 11 October 2007 informing the Commissioner that it had further reviewed the information and made some alterations to the application of sections 43 and 44. The FSA stated it had also now identified some passages which were publicly available and these were now annotated as exempt under section 21, but that it would now disclose these to the complainant.
24. Following a telephone conversation the FSA wrote again on 6 February 2008 explaining that it had further reviewed the information and made four amendments to its approach including the application of an additional exemption and the release of further information to the complainant. The FSA provided an updated copy of the information with the revised index and annotations. The FSA had identified some parts of the information which could now be disclosed and some where section 43 had been applied which it now considered fell within section 44 as it is information received from Riverstone and Lloyd's. Thirdly it now considered section 40 applied to the names of Riverstone's employees including senior managers. And fourthly the FSA found that section 31 also applied to the information withheld under section 43.
25. The Commissioner wrote again on 14 February 2008 clarifying the current position and asking the FSA to provide some additional explanation regarding the application of sections 43 and 31. The Commissioner also informed the FSA that in relation to section 12, the time taken to edit out exempt information or 'redact' the information cannot be considered when calculating the cost limit and asked

the FSA to reconsider the application of this exemption to the first request in light of this.

26. The FSA responded on 10 March 2008 providing a full response to all the issues raised in the Commissioner's previous letter.

Findings of fact

27. The information requested in the complainant's first request of 20 October 2005 is being withheld under section 12 of the Act and in the alternative under sections 44 and 43. In the complainant's information request of 29 November 2005 the FSA stated that the information covered by the first two parts of the request was not held and this has not been disputed by the complainant. The information covered by the third part of this request is being withheld under sections 40, 44, 43 and 31. Section 44 has been applied to the majority of the withheld information; section 40 has been applied to the names of individuals working for Riverstone Management Agent Ltd and information which can lead to their identification; and sections 43 and 31 have been applied to the remaining information jointly.

Background Information

28. Lloyd's is an insurance market in which members come together to underwrite risks through a syndicate. A syndicate is an arrangement whereby members collectively underwrite risks on a several but not on a joint basis. Syndicates do not have any personality as such – they are best thought of as collective arrangements which exist to enable members of Lloyds to underwrite risks in an efficient manner. Syndicates are managed within Lloyd's by managing agents such as Riverstone Management Agent Ltd (RMAL); they are responsible for conducting its affairs (accepting risks, collecting premiums, paying claims, purchasing and collecting reinsurance, investing premiums etc). The managing agent is in effect acting as a principal for the members participating in the syndicate(s).
29. Syndicates will actively underwrite new risks for a period of one year. In the following year a new syndicate is formed, usually with the same members as the existing syndicate. This in effect is a natural successor syndicate. This new syndicate will then accept all new risks for the new year and this process is repeated year after year.
30. At the end of its first year, a syndicate stops writing new risks but continues to function in the sense of paying claims, collecting reinsurance, earning investment income and all the other activities common to insurance business. The only thing it will not do is actively write new risks. After two years the syndicate manager will arrange to 'reinsure to close', the so-called RITC process. The syndicate will effectively roll forward all its assets and liabilities into another more recently formed syndicate, usually a successor syndicate. This normally occurs three years after a syndicate was formed i.e. after one year of active trading and two following years. When a syndicate reinsures to another syndicate it transfers all its assets and liabilities to that other syndicate. The receiving syndicate is then

responsible for the liabilities incurred on the policies which the original syndicate wrote.

Analysis

Procedural matters: Section 12 'Cost Limit'

31. Section 12 of the Act does not 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 state that it is likely to take more than two and a half days to retrieve the information and therefore complying with the 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'*.

32. The FSA explained that it had already spent 18 hours retrieving all the material relevant to the complainant's request of 20 October 2005. In doing so it had located 7 archived boxes of material. To go through the material and remove or edit out information which was not relevant to the complainant's request would take an additional 34 hours. The FSA explained that it took on average 50 seconds to review each page and then edit out the non-relevant information (as the pages retrieved also contained information in relation to another syndicate considered for closure by RMAL, Lloyds the FSA and other issues in relation to RMAL which fall outside the request) it would take a total of 34 hours thus exceeding the cost limit.

33. The Commissioner notes that the FSA can take into account 'extracting' the information from the document containing this. The Commissioner interprets this to mean the task of extracting the requested information from a document which contains other information which has not been requested. During the course of the investigation the FSA clarified that the 34 hours cited did not include any time taken to remove exempt information. The Commissioner considers that in the light of the volume of information located containing information relevant to the

request he is satisfied that to provide the complainant with all the information sought would exceed the appropriate limit.

34. Section 16 states that the FSA must provide advice and assistance in accordance with the section 45 code of practice. Where a public authority has sought to rely on the cost limit to refuse to disclose information, the Commissioner considers that the public authority should ask the complainant to consider refining their request to bring it within the cost limit. The FSA have explained that the complainant's request of 20 October 2005 was in relation to a specific transaction which would need to be located within the substantial amount of information held about the firm and therefore refining the request would not enable the request to be brought within the cost limit. In the circumstances of this case the Commissioner is satisfied that it is not reasonable to expect the public authority to offer advice and assistance.

Exemption: Section 44 'Prohibitions on disclosure'.

35. Section 44 provides that information is exempt if its disclosure by the public authority is prohibited under any enactment.
36. 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 questions, which relate to the wording of the bar; Is the information confidential under the terms of the FSMA? Has consent been given? Has the information already been disclosed to the public? Could the information be provided in the form of an anonymised summary?
37. The Commissioner first considered whether, for the purposes of section 348 of the FSMA, the information is confidential information. Confidential information as defined by section 348 must have been obtained 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.
38. The FSA have explained that any correspondence or documents from RML or from Lloyd's to the FSA have been received by the FSA in confidence for the purpose of carrying out its functions under the FSMA i.e. monitoring compliance by the regulated firm with the rules contained within the FSA's handbook and in particular SUP (supervisory provisions), PRU (prudential requirements related to financial resources), SYSC (senior management arrangements, systems and controls) and COND (threshold conditions for becoming and remaining authorised).
39. Section 314 of the FSMA imposes a statutory duty on the FSA to keep itself informed about the way in which the Council of Lloyd's supervises and regulates the Lloyd's market and the regulated activities carried on at Lloyd's. Section 314 also requires the FSA to keep under review the desirability of exercising its powers under Part XIX and in relation to the society under section 315.

40. The FSA's remit is to ensure that its statutory objectives are respected. In order to comply with those statutory requirements, the FSA bears in mind that its aims may not, in all cases, be the same as Lloyd's. To enable the FSA to monitor activities which may become subject to its regulatory functions, when Lloyd's exercises its powers, Lloyd's is required to report to the FSA not only on a statistical basis but in sufficient detail to facilitate that monitoring.
41. The Commissioner is satisfied that where section 44 has been applied in this case the information was received by the FSA from either RMAL or Lloyd's for the purpose of its functions in relations to the regulation of Lloyd's.
42. Section 348 (1) states that confidential information must not be disclosed without the consent of the person from whom the information was obtained or if different to whom the information relates. The FSA explained that it had not consulted Lloyd's about this request for two reasons. First that under section 348(1) (a), consent to disclose may need to be obtained from two persons rather than just one. The consent of the person from whom the FSA received the information (the source) will always need to be obtained but, if the information relates to a person other than the source, that person's consent will also need to be obtained. As the firms to which the request relates have refused to give their consent, the consent of Lloyd's alone would not be enough to allow disclosure. Secondly, the FSA stated it had consulted Lloyd's about a different request and the society refused to give its consent. Section 348 does not require consent to be sought. However, the Information Tribunal found in decision EA/2005/0019 '*Slann vs. Financial Services Authority*' that where consent has not been sought that the FSA should consider the likelihood that it would be given if sought. In this case it is the opinion of the FSA that consent from the parties would not be given.
43. Section 348 (4) recognises 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 the information is about a specific firm. It would therefore not be possible to provide the information in any form which would not enable the person to be identified.
44. 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 EA/2005/0019 '*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.
45. 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. Section 44 is an absolute exemption and there is no requirement to consider the public interest test.

Section 43 'Commercial Interests'

46. Section 43 provides that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person.
47. In considering whether the exemption applies in this case, the Commissioner has applied the test for 'would or would be likely to prejudice' as set out in 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*.
48. 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 chance should be greater – more probable than not.
49. The FSA explained that the information withheld under section 43 consists of its analysis of information received from the firm and Lloyd's; notes of its discussions with RMAL and Lloyds and the FSA's views and judgements in relation to the proposal to close the syndicate.
50. The FSA explained that the information generated about the firms is intrinsically linked to the section 44 information received from third parties. The FSA explained that to provide the information withheld under section 43 without the information withheld under section 44 would provide the information without any context. The opinions of the FSA would therefore be seen without the benefit of any underlying information from which to contextualise or interpret those opinions. The FSA also explained that to release the information would draw unwarranted attention to the firm because the FSA does not publish this type of information routinely and so its availability would be seen as a new development and lead to comments being made which would otherwise not be. The FSA further explained that legal disputes between managing agents and their Names are a regular occurrence and there is a strong possibility that disclosure would result in Names starting litigation against the firm which would harm its commercial interests.
51. The FSA also explained that the issue in this case is that the estimation of outstanding liabilities is not an exact science and the risk premium therefore involves a degree of subjectivity and uncertainty about the ultimate quantification of the liabilities. It is this aspect of the RITC quote that is commercially sensitive. Where a third party syndicate is involved this will involve negotiation between the managing agents of both syndicates. This is a commercial negotiation, to which the FSA is not a party and it does not therefore opine on the reasonableness of

the risk premium charged. The Names are also not party to this negotiation. It is the FSA's view that it would be harmful to Lloyds and managing agents to have to disclose commercially sensitive aspects of the RITC process to any third party as it is a negotiation over a reinsure contract and should be subject to the normal commercial confidentiality provisions.

52. The FSA also provided some specific examples to demonstrate how disclosure would, or would be likely to prejudice Lloyd's commercial interests. The FSA said that some of the information comprises impact rating scores, its analysis of the proposal and issues arising from its visits to Lloyd's. Such information generated about Lloyd's is intrinsically linked to the information withheld under section 44 and disclosure of this information alone without disclosure of the section 44 information would be leave some statements open to incorrect interpretation. Disclosure of such information is likely to harm the FSA's efficiency and effectiveness in carrying out its functions as firms would be less willing to accept shortcomings and take remedial action.
53. The FSA explained that some of the information comprises questions and comments made on the proposal by the FSA at a meeting. Disclosure of the FSA's comments about the proposal (although now resolved and approved) is likely to lead to consumer confidence in the firm being adversely affected. Disclosure of regulatory discussion will have an impact on any future discussions with RMAL and Lloyd's. The FSA pointed out that once its is perceived as having disclosed such discussions, it will have a knock-on effect in that other managing agents will be less willing to engage in dialogue and provide it with information. The FSA also explained that disclosure of the information would harm the commercial interests of RMAL as without some of the other withheld information it would result in a one sided picture of the firm. The FSA stated that under the present regime there is no systematic disclosure of this type of information and disclosure will result in third parties misconstruing the information and lead them to draw wrong conclusions.
54. The Commissioner has viewed the information withheld under section 43 and considered the arguments presented by the FSA. Whilst the Commissioner does not accept that 'misinterpretation' of the information is a valid reason for withholding information, he does note that in this case he has upheld the application of section 44 to the majority of the withheld information. However, the Commissioner considers that this still does not provide sufficient justification to withhold the information under section 43. The FSA would be free to provide context to the information if it were disclosed or an explanation to the public to explain why the information may appear one sided,
55. The FSA also argued that disclosure would bring unwarranted attention to the firm as it does not publish this sort of information routinely. Whilst the Commissioner appreciates the concerns of the FSA he does not accept that this is a valid argument for withholding the information under section 43. He also does not accept the argument that disclosure would harm the firm's commercial interests as it could lead to litigation from Names against the firm. Whilst the Commissioner accepts that potential litigation may not be desirable for the firm, the FSA have already explained that legal claims between Names and their

managing agents are common. Whilst this disclosure may encourage litigation, there is no evidence that this would add significantly to any commercial prejudice already faced by the firms by potential litigation.

56. The FSA stated that the estimation of outstanding liabilities is not an exact science and is a process of which neither it or the names is involved. The FSA assert that to disclose the commercially sensitive aspects of the RITC information would harm RMAL. However, the FSA have not stated how disclosure of this information would harm RMAL. The Commissioner also notes that the RITC has been resolved, agreed and approved.
57. The FSA's final argument is that disclosure would make the firms less willing to co-operate with the FSA in future and to have open dialogues with the FSA. The Commissioner does not consider that this argument relates to any commercial interests of the firm or any other persons.
58. For the reasons above the Commissioner finds that section 43 is not engaged as he does not consider that disclosure would, or would be likely to prejudice the commercial interests of any party.

Section 31 'Law enforcement'

59. 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 which 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.
60. The FSA have also applied section 31 to the information withheld under section 43. The FSA argue that disclosure would be likely to result in firms being less open with it and so adversely affect its ability to monitor their compliance with its requirements. The FSA explained that the purposes listed in 31 (2) relate to the FSA's monitoring function under the FSMA. The FSA monitors whether regulated firms are complying with any requirements imposed on them by the FSMA.
61. The FSA explained its functions in relation to Lloyd's as laid out in section 314 of the FSMA:

*“(1) the Authority must keep itself informed about –
(a) the way in which the Council supervises and regulates the market at Lloyds; and*

(b) the way in which regulated activities are being carried out in that market.

62. 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 or be likely to prejudice any of these functions. The Commissioner has considered the definition of prejudice as discussed in Tribunal decision EA/2005/005 '*John Connor Press Associates vs. The Information Commissioner*'. (see paragraphs 47 and 48)
63. Disclosure of such information, the FSA argues, would harm its effectiveness as regulator. Although the FSA has powers of compulsion that can be used against firms the use of such powers has disadvantages. These include the time and resources necessary to ensure their effective deployment and the presumption that the FSA knows in advance what information it is seeking.
64. The Commissioner recognises the concerns of the FSA that disclosure could impact on its relations with firms, 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 demonstrate a real prejudice or likelihood of prejudice to any of the functions in section 31(2)(a),(b),(c) and (d). The Commissioner notes that the FSA does have powers under the FSMA to compel firms to cooperate with it and provide it with information. Whilst the FSA may find it easier to maintain an informal relationship it is not essential for these informal relations to continue in order for the FSA to maintain its ability to regulate effectively. The Commissioner also notes that the FSA does not claim that firms would stop being open with it only that they would be likely to be less open. Furthermore it is in the firms own interests to maintain good and open relationships with the FSA in order to resolve problems swiftly without the need for more formal, public action being taken against them. The Commissioner does not consider that the extent of disadvantage cited by the FSA amounts to prejudice of likelihood of prejudice to its functions as regulator.
65. The Commissioner finds that the exemption at section 31 is not engaged as the FSA have failed to demonstrate that disclosure would, or would be likely to prejudice any of the purposes specified.

Section 40 'Personal data'

66. Section 40 provides that information is exempt if the information is the personal data of someone other than the applicant, (third party data), and disclosure of the information would breach any of the data protection principles. The term 'personal data' includes information about a living individual from which that individual can be identified.
67. In order for the Commissioner to reach a decision as to whether section 40 has been applied correctly the Commissioner must first consider if the information is personal data and then decide if disclosure would breach any of the data protection principles.

68. Section 41 has been applied to the names of employees of RMAL. Section 40 has also been applied to certain job titles. The FSA explained that whilst these references do not contain individuals' names it would be possible to identify the individuals to whom the data relates as their names are available from Companies House. Having viewed the information withheld the Commissioner is satisfied that the information is personal data.
69. The Commissioner must therefore decide if disclosure of the information would breach any of the data protection principles. The first data protection principle requires that personal data be processed fairly and lawfully. When considering compliance with the First Data Protection Principle it is necessary to consider, among other things, if the disclosure is necessary for a legitimate interest of the recipient (the public), and then even if it is necessary would it nevertheless be unwarranted by reason of prejudice to the rights and freedoms of the data subject.
70. The FSA explained that in considering if disclosure of the information would be fair to the individuals it considered that where they are named the sections contain the FSA's comments on their suitability for their respective roles. As these individuals would need to be approved by the FSA to carry out their roles, these comments therefore relate to their fitness to be approved persons. While approved persons are aware that adverse findings against them by the FSA can be publicised this is only after a formal process involving notices and chances to make representations. The FSA also pointed out that RMAL employees are not public sector employees.
71. The Commissioner accepts that, to release this kind of personal data about the individuals would contravene the fairness element of the first data protection principle.
72. The Commissioner therefore finds that section 40 is engaged.

The Decision

73. 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 44 to the withheld information
 - (ii) the application of section 40 to the names of RMAL employees
74. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- (i) The FSA breached section 1(1) (b) of the Act as it misapplied sections 43 and 31 to the withheld information.
 - (ii) The FSA, during the course of the investigation, sought to rely on exemptions which were not referred to in the refusal notice or at the internal review. This is in breach of section 17(1) (b).

Steps Required

75. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclosure the information withheld under sections 43 and 31

76. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

77. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

78. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 14th day of April 2008

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Law enforcement.

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).”

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Commercial interests.

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43(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 the interests mentioned in subsection (2).”

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).”

Financial Services and Markets Act 2000

348 Restrictions on disclosure of confidential information by Authority etc

(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.

349 Exceptions from section 348

- (1) Section 348 does not prevent a disclosure of confidential information which is—
- (a) made for the purpose of facilitating the carrying out of a public function; and
 - (b) permitted by regulations made by the Treasury under this section.
- (2) The regulations may, in particular, make provision permitting the disclosure of confidential information or of confidential information of a prescribed kind—
- (a) by prescribed recipients, or recipients of a prescribed description, to any person for the purpose of enabling or assisting the recipient to discharge prescribed public functions;
 - (b) by prescribed recipients, or recipients of a prescribed description, to prescribed persons, or persons of prescribed descriptions, for the purpose of enabling or assisting those persons to discharge prescribed public functions;
 - (c) by the Authority to the Treasury or the Secretary of State for any purpose;
 - (d) by any recipient if the disclosure is with a view to or in connection with prescribed proceedings.
- (3) The regulations may also include provision—
- (a) making any permission to disclose confidential information subject to conditions (which may relate to the obtaining of consents or any other matter);
 - (b) restricting the uses to which confidential information disclosed under the regulations may be put.
- (4) In relation to confidential information, each of the following is a “recipient”—
- (a) a primary recipient;
 - (b) a person obtaining the information directly or indirectly from a primary recipient.
- (5) “Public functions” includes—
- (a) functions conferred by or in accordance with any provision contained in any enactment or subordinate legislation;
 - (b) functions conferred by or in accordance with any provision contained in the Community Treaties or any Community instrument;
 - (c) similar functions conferred on persons by or under provisions having effect as part of the law of a country or territory outside the United Kingdom;
 - (d) functions exercisable in relation to prescribed disciplinary proceedings.
- (6) “Enactment” includes—
- (a) an Act of the Scottish Parliament;
 - (b) Northern Ireland legislation.
- (7) “Subordinate legislation” has the meaning given in the [1978 c. 30.] Interpretation Act 1978 and also includes an instrument made under an Act of the Scottish Parliament or under Northern Ireland legislation.