

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 July 2010

Public Authority: The Financial Services Authority

Address: 25 The North Colonnade
Canary Wharf
London
E14 5HS

Summary

The complainant requested information which related to the Split Capital Investment Trust investigation that had been submitted to the board of the Financial Services Authority (FSA). The FSA failed to respond within the required 20 working days and as such failed to meet the requirements set out in section 10 of the Freedom of Information Act 2000. With regards to the information requested, the FSA stated that it does not hold any information that falls within the scope of the request. The Commissioner has investigated the complaint and is satisfied that the FSA does not hold information covered by the scope of the request.

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.

Background

2. In 2004 the FSA conducted an investigation into the activities of certain fund managers and brokers operating within the split capital investment trust sector between September 2000 and February 2002. The FSA reached agreement with the firms to resolve the investigation

and published its report on 24 December 2004; this report can be viewed on the FSA website at:

<http://www.fsa.gov.uk/Pages/Library/Communication/PR/2004/114.shtml>

The Request

3. The complainant submitted the following request to the FSA on 29 October 2007:

“With regard to an FSA publication (FSA/PN/114/2004-24/12/2004), there were statements made by the FSA in relation to the activities of a number of firms involved in Split Capital Investment Trusts. Please provide me with ALL the information which would have been fully considered by FSA Senior Management and Board Members in relation to the following:

- 1) Copies of all FSA documents detailing the reasons as to why it was deemed necessary by the FSA to issue (redacted name) with a warning and to obtain an agreement preventing him from applying for any controlled function for a period of seven years.
- 2) Copies of all documentation which provides the base evidence and reasons for the following statements documented in the FSA announcement:

The FSA has identified several areas where the financial services industry must learn lessons, if the investors are to renew their confidence in the investment sector and investment trusts in particular:

- Practices which create misleading market information and impressions or conceal information are not acceptable.
- The rights of different classes of shareholders must be clearly presented. Regard must be had to the suitability of investments for a specific fund.
- Firms must properly manage conflicts of interests. Where a firm manages or advises more than one investment fund, it must ensure that any transactions between such funds are conducted transparently, at arms-length and in the best interests of the investors in the funds affected.

- Material promoting investment products must properly disclose the specific and significant risks relevant to the product and/or the market at the time it is being promoted. Where the risk characteristics have changed markedly over time it is the responsibility of firms to reflect these changes in promoting the product.
 - Investment decisions made by fund managers and advice given by brokers should be motivated by proper consideration of the best interests of the investment fund they advise and their investors.
- 3) Copies of ALL FSA documentation in relation to Sections 1 and 2 above, which specifically relate to Aberdeen Asset Managers [sic] Limited (AAML), and deals with the manner in which financial products were promoted to AAML Clients-please include those documents dealing with breaches of FSA or IMRO guidelines/rules, and/or any other practices or failings considered to be detrimental to the interests of their Clients.

In order that my request is not in any way deemed to conflict with any of the 'exemptions' specified within the Freedom of Information(FOI) Act, please note that I am not requesting copies of any information received in confidence by the FSA. However, I am requesting all those FSA written documents and other applicable publications, including letters, e-mails, reports etc, which have been provided to Senior Managers and Board Members in order to fully justify the reasons for the statements made above the subsequent actions taken by the FSA in relation their Split Capital Investment Trust investigation."

4. The FSA responded on 12 November 2007 and advised that the request was too large to be met within the cost limit under Section 12. The FSA did however state that they would be able to consider a request for the following information within the 18 hour limit:
- FSA Board minutes and accompanying papers submitted to the Board in relation to Split Capital Investment Trust investigation.
5. The complainant wrote to the FSA on 16 November 2007 to accept their proposal to refine the request. He did however add the caveat that his original request should remain active and/or an internal review undertaken if there was a significant void between the information requested and that supplied.
6. On 30 November 2007, the FSA wrote to the complainant to confirm that they held information pertaining to the revised request. The FSA

- cited absolute exemptions under sections 21 and 44 of the Act as well as qualified exemptions under sections 31, 36 and 44 for which it said it would be applying public interest considerations.
7. The complainant wrote to the FSA on 7 December 2007 to express dissatisfaction with the handling of his request and to request an internal review.
 8. The FSA issued a refusal notice on 14 March 2008 and cited exemptions under sections 31 (law enforcement), 40 (personal information), 43 (commercial interests) and 44 (prohibitions on disclosure).
 9. The complainant again wrote to the FSA on 22 March 2008 to request an internal review.
 10. The FSA wrote to the complainant on 11 and 29 April 2008 with updates. It was not until 2 June 2008 that it advised the complainant of the outcome of the internal review.
 11. The FSA concluded that the previously claimed exemption under section 43 did not apply. It did however conclude that exemptions under sections 31, 40 and 44 had been correctly applied.

The Investigation

Scope of the case

12. On 21 July 2008 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 whether the FSA had fully addressed his information request of 29 October 2007.
13. As the scope of the original request was deemed to be too wide to be managed within the cost parameters of the Act, it was refined at the suggestion of the FSA and agreed by the complainant on 16 November 2007. On agreeing to the revised request the complainant did add the caveat that should there be a significant void between the information requested and that supplied, then the original request should remain active. The FSA, in considering the revised request did give this caveat due consideration. It considered whether papers submitted to the Executive Committee (ExCo) of senior managers, as well as FSA Board minutes and accompanying papers submitted to the Board, contained

information relating to points 1 to 3 of the original request dated 29 October 2007. The Commissioner has restricted his investigation to the revised request as he considered this to have replaced the original request. The original request was closed on the grounds of cost (section 12) with the agreement of the complainant and therefore the Commissioner has not investigated the matter further.

Chronology

14. On the 13 July 2009 Commissioner asked the FSA to provide further details to support its decision to refuse the revised request of 16 November 2007 on the basis of exemptions under sections under sections 31, 40 and 44.
15. The FSA responded on 29 October 2009 by advising the Commissioner that, having revisited its approach to the information request, it does not hold any information covered by the scope of the request.
16. The Commissioner wrote to the complainant on 5 January 2010 with his findings with a view to an informal resolution.
17. The complainant wrote to the Commissioner on 13 January disputing the assessment of the FSA that the requested information was not held. He referred to the FSA's letter to him of 14 March 2008 in which it stated that information relevant to his request was held but withheld as it was covered by exemptions.
18. The Commissioner sought clarification from the FSA in his letter of 15 January 2010.
19. The FSA provided the Commissioner with a substantive response on 19 February 2010. The FSA confirmed that it placed two qualifications on the scope of the request; the first was that the information had to fall within points 1 to 3 of the original request and the second was that it had to have been '*fully considered by FSA Senior Management and Board Members*'. The FSA reiterated that they do not hold any information within the scope of the request.
20. The complainant wrote to the Commissioner on 24 February and again on 1 March 2010 to express his dissatisfaction with his conclusions especially with regards to the interpretation of the scope of the request. The complainant also expressed concerns with the records management policy of the FSA. This matter has been dealt with separately and is not covered further in this Decision Notice.

21. The Commissioner wrote to the complainant on 26 April 2010 to advise that he would be working toward the issue of a Decision Notice.

Analysis

Substantive Procedural Matters

Is the information held by the FSA?

22. The Commissioner considers that the complainant's correspondence of 16 November 2007 actually represented a new request and should be treated as such.
23. The FSA initially stated that information within the scope of the request was held but that it was covered by various exemptions. This was repeated at the internal review stage. The FSA subsequently made it clear to the Commissioner, once his investigation was underway, that the information was in fact not held. The Commissioner therefore considers that the FSA did not comply with its obligation under section 1(1)(a) to state that the information requested on 16 November 2007 was not held.
24. The complainant has alleged that the FSA does indeed hold the information requested on 16 November. If this was the case, the FSA would be in breach of its obligation under both section 1(1)(a) to state whether information is held and 1(1)(b) to communicate information that is held to the applicant. In order to help consider the complaint, the Commissioner has sought to establish the reasons for the volte-face by the FSA with regards to information held.
25. On 14 March 2008 the FSA confirmed to the complainant that it held information within the scope of his revised request. An element of confusion appears to have crept in as the FSA went on to explain that:

'...we have identified further documents which whilst not constituting 'Board Minutes' or 'accompanying papers' in relation to the FSA's investigation into the Split Capital Investment Trust sector are nonetheless documents which we feel are relevant to your request and ought to be considered in the context of your request, as they represent reasonably settled views within our Enforcement Division. These documents take the form of reports (either in final or draft form) relating to AAML and to (redacted name).'

26. The discovery of the three additional documents is somewhat surprising as it was the FSA who had originally suggested the refinement to the original request to comply with section 12 cost limits. The FSA has advised that the three additional documents of potential interest came to light when dealing with other unrelated information requests pertaining to the split capital trust investigation.
27. The refusal of 14 March 2008 went on to explain that the information held of relevance to the request was determined on the following basis:
 - (a) Board minutes and accompanying papers submitted to the Board
 - (b) Specific documents relevant to the role of AAML and (redacted name) mentioned above
28. The FSA subsequently made it clear to the Commissioner once his investigation was underway that the information was not held. It appears that the FSA reverted back to the complainant's original request to reach this conclusion. This placed two qualifications on the scope of the request. The first qualification was that the information had to fall within points 1 to 3 of the original request and that the second was that it had to have been *'fully considered by FSA Senior Management and Board Members'*. Having already notified the Commissioner that the information contained within the Board Minutes and accompanying papers submitted to the Board did not contain any information relevant to the request, the two qualifications resurrected by the FSA effectively excluded the information contained within the three documents from the scope of the request as well.
29. The complainant had made it clear to the FSA that if his revised request did not yield the information as sought in his original request then he would like his original request resurrected. The FSA were mindful of this and therefore wanted to ensure that the refinement did capture information relating to points 1 to 3 of the complainant's original request of 29 October 2007. The Commissioner recognises that it could indeed be argued that the scope of the revised request had been changed to include the first qualification. By including the first qualification, the Commissioner believes that resultant documents identified would be more in keeping with the scope of the original request and ultimately more likely to satisfy the complainant.
30. The revised request that resulted in the review of Board minutes and accompanying papers did not yield any information relating to points 1 to 3 of the complainant's original request. The FSA however did identify three additional documents that were not classed as Board Minutes or accompanying papers that were submitted to the Board. The three

additional documents clearly fell outside the scope of the revised request. However in order to be helpful the FSA did initially consider these documents within the scope of the revised request.

31. It was the FSA who initiated the narrowed focus in relation to the first request in order to comply with the cost limit (section 12). It was the FSA who also identified certain documents of potential interest that were outside this narrow focus. It is therefore not surprising that the complainant has expressed dissatisfaction with the FSA pronouncement that they did not hold any relevant information within the scope of his request. The Commissioner, whilst he may share some of the concerns expressed by the complainant, is limited only to establishing whether the information is in fact held by the FSA.
32. The FSA advised the Commissioner that when the complainant's request was refined, it had only searched for information that was considered by the *'Board members'*. The FSA, of its own volition, decided to expand its search to include information that was provided to *'FSA's Senior Management'* called the Executive Committee (ExCo) as well. The Commissioner, whilst he can understand the reason as to why the FSA revised the scope of the request to comply with cost considerations, is less clear as to why the revised scope was later expanded to include information considered by *'FSA's Senior Management'* as well. This point has not been pursued by the Commissioner as the expanded search too had not identified any information relevant to the request.
33. The FSA have advised that of the three documents identified, two were marked as drafts with nothing to indicate that they were ever finalised. It has argued that these documents represented the views of the FSA member(s) of staff who authored the report, at a particular point in the investigation. It argued that it did not follow that these draft reports would have been considered by FSA senior management and have confirmed that they have found nothing to indicate that the draft documents were indeed considered by the Board or ExCo. With regards to the third document, even though it was a finalised document which may have been seen by the former Chief Executive of the FSA as part of the settlement discussions, the FSA again stated that it had found no evidence to indicate that the document had been considered by him or by the Board or by ExCo. The FSA have further stated that a review of the three documents suggested that they did not contain any information in relation to point 1 to 3 of the complainant's original request.

34. Whilst the Commissioner may agree with the assertion made by the FSA that the documents in question fall outside the scope of the request, it must be borne in mind that it was the FSA itself that brought to the attention of the complainant the existence of the documents in the first place. Having brought them to the attention of the complainant, the FSA quite rightly realised at a later date and after the involvement of the ICO, that the documents were not in fact requested by the complainant as they had not been fully considered by FSA Senior Management and Board Members. Whilst the reversion to the qualifications set by the complainant in his original request has caused consternation, most notably to the complainant, the Commissioner is satisfied, having considered the arguments put forward by the FSA that the three documents indeed fell outside the scope of the request.

Procedural Requirements

Section 10-time for compliance

35. The complainant's original request was dated 29 October 2007. Following a revision to narrow the scope of the request, initiated by the FSA, a newly defined request was taken forward on 16 November 2007. The FSA issued a refusal notice in relation to this request over 80 days later on 14 March 2008 (if the date of the first request is taken as the date of receipt then this delay stretches to over 90 days). The FSA advised the complainant that it was considering a public interest test (PIT) on three occasions (30 November 2007, 11 January 2008 and 15 February 2008). Such a delay does not comply with the requirements of section 10(1) and further fails to conform to the Commissioner's guidance on the timescales for consideration of the PIT.

The Decision

36. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act because:
- It failed to state whether the information was held in accordance with its obligations under section 1(1)(a) of the Act within 20 working days following the date of receipt of the request. The FSA therefore breached section 10(1) of the Act.
 - It did not state whether the information was held in accordance with its obligations under section 1(1)(a) of the Act.

37. However, the Commissioner is satisfied that the FSA does not hold any information falling within the scope of the complainant's request whatever interpretation is reasonably placed on this.

Steps Required

38. The Commissioner requires no steps to be taken.

Other matters

39. Whilst there is no statutory timescale for the conducting of an internal review, the Commissioner's guidance states that this should be completed within 20 working days, or in exceptional circumstances, within 40 days.
40. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Code explains that any written reply from the applicant which expresses dissatisfaction with an authority's response should be handled as a complaint (internal review). As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it appears to have taken the authority over 72 days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

41. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 28th day of July 2010

Signed

**David Smith
Deputy 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."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."