

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 May 2012

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

Decision (including any steps ordered)

1. The complainant has requested a copy of the Lehman Report, commissioned by the trustees of Pearl Group. The Financial Services Authority ("FSA") confirmed it held a draft version of the report but considered it exempt from disclosure under section 44 of the FOIA by virtue of section 348 of the Financial Services and Markets Act 2000 ("FSMA").
2. The Commissioner's decision is that section 348 of the FSMA does provide a statutory bar from disclosure and therefore section 44 of the FOIA was correctly applied by the FOIA to refuse the request.

Request and response

3. On 3 October 2011, the complainant wrote to the FSA and requested information in the following terms:
"I still need to see a copy of the Lehman Report"
4. The FSA responded on 31 October 2011 stating that a draft copy of the report had been identified and had been received by the FSA under section 348 of the FSMA as it was received for the purposes of carrying out the FSA's regulatory functions under the FSMA. It stated that it therefore considered the report to be exempt from disclosure under section 44 of the FOIA as section 348 of the FSMA prohibited disclosure of confidential information received for this purpose.

5. The complainant requested an internal review on 3 November 2011. Following an internal review the FSA wrote to the complainant on 8 December 2011 upholding its decision that section 44(1)(a) of the FOIA prevented disclosure by virtue of section 348 of the FSMA.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant has drawn attention to the fact that he initially requested a copy of the Lehman Report in April 2010 and was informed that the FSA did not hold it only for the FSA now to have found a draft copy of the report in response to this later request.
7. The complainant has also argued that sections 349(3A) and (3B) of the FSMA allows disclosure of 'confidential information' in some circumstances and could have applied to allow the FSA to disclose the report.
8. The Commissioner considers the scope of his investigation to be to determine whether section 348 of the FSMA applies to the information in the draft Lehman Report.

Reasons for decision

Section 44(1)(a) – statutory prohibitions on disclosure

9. Section 44(1)(a) of the FOIA states that information is exempt if its disclosure is prohibited by or under enactment. The FSA states it is prohibited under section 348 of the FSMA from disclosure of 'confidential information' it has received.
10. Section 348(1) states that:

“Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of –
 - (a) the person from whom the primary recipient obtained the information; and*
 - (b) if different, the person to whom it relates.*

11. When considering if section 348 applies the Commissioner was mindful of previous decisions relating to the application of section 348 as a statutory prohibition on disclosure by the FSA¹.
12. The Commissioner has taken these Tribunal cases into account when considering this case and as such must establish if the FSA is a primary recipient, if the request is for 'confidential information' and, if so, if there is consent to release the information or could this be obtained.

Is the FSA a primary recipient?

13. A primary recipient is defined at section 348(5) of the FSMA and includes the FSA. The Commissioner therefore considers the FSA to be a primary recipient for the purposes of the FSMA.

Is the request for confidential information?

14. Confidential information is defined in section 348(2) as information which relates to the business or other affair of any person and was received by the primary recipient for the purposes of, or in the discharge of, its functions and is not prevented from being confidential.
15. To establish if information is 'confidential information' the Commissioner must consider the following:
 - Does the information relate to business or other affairs of any person?
 - Was the information received by the primary recipient for the purposes of, or in discharge of, any of its functions?
 - Has the information already been made legitimately available to the public?
 - Can the information be anonymised?
16. The Commissioner has first considered if the information relates to the business or affairs of another person. A person is not defined in section 348 of the FSMA so is taken as having its legal interpretation, that is any entity that is recognised as having legal personality to enter legal relations, for example, any person, a company, unincorporated association, partnership or sole trader.

¹ *FSA v ICO (EA/2007/0093 & 0100)* and *Slann v FSA & ICO (EA/2005/0019)*

17. In a case considered by the High Court², one of the key issues discussed was whether the information was 'confidential information' within the scope of section 348 and therefore whether the information was protected by section 44 of the FOIA.
18. The High Court confirmed that it was important to consider not just the information that answers the request but to also place it into the context of the information in the request itself. In this case the request was for a copy of the Lehman's Report and the FSA identified a draft copy of the report. This draft copy was not prepared specifically for the FSA but the FSA as the regulator had a direct interest in the contents of the report and received a copy of it from Pearl Group.
19. The Commissioner therefore considers the information does relate to the business or affairs of another person, in this case Pearl Group, particularly when considering the context of the report and its contents.
20. The Commissioner has now moved on to consider whether the information was received by the FSA for the purposes of, or in discharge of, any of its functions.
21. Section 348(3) of the FSMA sets out that for information to be confidential information it does not matter whether the information was received by virtue of a requirement to provide it under the FSMA. The Commissioner's view based on this and previous decision is therefore that it does not matter if information was provided voluntarily to the FSA or under compulsion. The key issue is whether the FSA can demonstrate the function it was discharging when it received the report.
22. The FSA states that the report was sent by Pearl Group as part of the continual process of monitoring Pearl Group's compliance with the requirement to hold capital resources that are adequate to support the business of the group. Insurance companies' obligations to hold adequate resources are set out in Threshold Condition 4 in Schedule 6 to the FSMA and the FSA's obligation to monitor firms is set out in paragraph 6 of the Schedule 1 to the FSMA.
23. Having considered this, the Commissioner accepts that the FSA was fulfilling a regulatory function by receiving the report and for the information to be 'confidential information' the Commissioner must now consider the final two points: has the information already been legitimately made available to the public and can it be anonymised.

² *FSA v ICO [2009] EWHC 1548*

24. Section 348(4) states that information cannot be confidential information if it has already been made available to the public. The Commissioner's view is that this is relevant only where information has already been made public without breaching the FSMA and he is not aware that this report in either its draft or completed form has been made available.
25. Section 348(4) also states that information cannot be confidential information if it can be summarised or framed in a way where it is not possible to ascertain information relating to another person (where person has its legal meaning and includes companies). Given the nature and purpose of the Lehman Report the Commissioner accepts that it would not be possible to anonymise the information.
26. Considering all of the above, the Commissioner has concluded that the withheld information is confidential information for the purposes of the FSMA.

If it is confidential information is there consent to its release or can this be obtained?

27. Consent for disclosure would have to be obtained from the person from whom the FSA obtained the information, in this case Pearl Group. The FSA has explained that it approached Pearl Group to ask for the consent necessary to allow disclosure of the draft report but Pearl Group refused to provide this. As the FSA were unable to obtain the appropriate level of consent the Commissioner accepts the withheld information is still considered confidential information and cannot be disclosed under section 348.

Do any of the exceptions from section 348 apply?

28. Section 349(1) states that:

"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."*

29. The Regulations referred to in section 349(1)(b) are the Financial Services and Markets Act 2000 (Disclosure of Confidential Information Regulations 2001 S.I. 2001 No. 2188). The Regulations include provisions for disclosure of confidential information in specific

circumstances, for example in connection with criminal proceedings or for certain public functions.

30. The complainant specifically asked both the FSA and the Commissioner to consider whether sections 349(1)(a), 349(3)(a) and 349(3)(b) could be used to disclose the requested information. These sections allow the regulations to make provisions for the disclosure of confidential information subject to conditions (such as the obtaining of consents), or where it is for the purpose of facilitating the carrying out of a public function, and restrict the use to which confidential information disclosed under these regulations can be put.
31. The FSA has considered whether any of the exceptions from section 348 apply, in particular it considered the sections put to it by the complainant, and it concluded that both these subsections and all other subsections in section 349 did not apply and the requested information could not be disclosed.
32. The Commissioner considers section 349 of the FSMA does provide specific 'gateways' for disclosure of confidential information. However, as with the gateways under other pieces of legislation, he considers that the gateways in the FSMA give the power to disclose but not a duty to disclose. The FSA has considered the gateways but ultimately concluded that none of them provided a basis for making a disclosure in this case.
33. The Commissioner accepts therefore that section 348 of the FSMA acts as a statutory prohibition on disclosure and the FSA has correctly applied section 44 of the FOIA to withhold the requested information.

Right of appeal

34. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
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Information Commissioner's Office
Wycliffe House
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