Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0093 and 0100
Information Commissioner's Refs: FS 50075781 and FS 50094595

Heard at Procession House, London, EC4
On 25th & 26th February 2008
22nd & 23rd July 2008

Decision Promulgated
13 October 2008

BEFORE

CHAIRMAN

David Marks

and

LAY MEMBERS

Dr Malcolm Clarke
Dr Henry Fitzhugh

Between

FINANCIAL SERVICES AUTHORITY

Appellant

and

INFORMATION COMMISSIONER

Respondent

Subject matter: **Section 44 Freedom of Information Act 2000 - Financial Services and Markets Act 2000 - confidential information - due process - human rights**

Representation:

For the Appellant: Charles Flint QC
Jason Coppel

For the Respondent: Jane Oldham

Decision

The Tribunal determines the preliminary issue in favour of the Respondent, namely the Information Commissioner. For the avoidance of doubt, there is to be no disclosure of any requested information pending a determination or other resolution of the Appeals.

Information Tribunal **Appeal Number:** EA/2007/0093 and 0100

Dated this 13th day of October 2008

Deputy Chairman, Information Tribunal

Reasons for Decision

1. This judgment concerns the determination of a preliminary issue in 2 consolidated appeals which are being pursued by the Financial Services Authority (FSA) against 2 Decision Notices of the Information Commissioner (the Commissioner). At a directions hearing heard on 24 October 2007 the parties and the Tribunal agreed that the preliminary issue in both appeals should be whether the FSA is and was entitled to withhold disclosure of the names and identities of certain firms involved in the provision of endowment mortgages which carried on business subject to FSA supervision as well as of the names and identities of certain firms who had been the subject of a so called mystery shopping exercise, pursuant to the provisions of section 44 of the Freedom of Information Act 2000 (FOIA) when read together with the relevant provisions of the Financial Services and Markets Act 2000 (FSMA). The above formulation is almost word for word the way in which the preliminary issue is formulated in the directions. All the parties in the Tribunal agreed at that stage that if the determination of the preliminary issue was resolved in favour of the FSA the appeal could be disposed of expeditiously without the need to investigate a number of other separate grounds which the FSA had raised in connection with the 2 appeals.

2. In the result the hearing in the preliminary issue took somewhat longer than the anticipated time which the directions had previously envisaged. The hearing was interrupted through no party's fault by a relatively lengthy adjournment. However, at the same time the Tribunal has benefited from an extensive and thoughtful set of submissions from both parties. It is extremely grateful for the care and detail which both parties took and which they brought to the hearing.

3. It is enough at this stage to set out the portions of section 44 of FOIA which are well known and which provide in relevant part as follows:

"(1) 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 …"

Section 44 is, as is also well known, an absolute exemption.

Appeal 93 : background

4. The 2 appeals can be called Appeal 93 and Appeal 100, taking the principal case number references involved. Appeal 93 originated with a written request made on 4 January 2005 by a Mr E. Owen under FOIA as to how many and which providers used "inappropriate charges" to set premiums as described in what are called "Decision Trees" issued by the Financial Ombudsman Service (FOS) and whether the FSA carried out a review of some sort in 2001. The request went on to specify that it related to "All financial products sold between April 1988 and January 1995 (or later?)". The request self evidently needs some explanation.

5. Mr Owen, who is not a party to the Appeal made a request on behalf of an organisation called the IFA Defence Union. The letters IFA stand, it seems, for Independent Financial Advisers. As the FSA's first formal reply to Mr Owen of 31 January 2005 made clear, the FOS had published on its website the Decision Trees. These Trees are a set of graphic representations of the circumstances in which action could or could not be taken identifying circumstances in which firms involved in the selling of endowment mortgage related products applied standard charges for their services as required by rules imposed by LAUTRO, namely the Life Assurance and Unit Trust Regulatory Authority, at a time and where the said firms did not take available measures in order to reflect the actual charges appearing on or in relation to the policies which they offered and provided. The Decision Trees in question will be set out in further detail below. The principal fault identified by the Decision Trees was the resultant pre-contractual misrepresentation and/or breach of contractual warranty which the failure to reflect the actual charges resulted in. LAUTRO was in due course replaced by the FSA itself.

6. A print out of the relevant Decision Tree was presented to the Tribunal. For the sake of completeness it should be noted that the Ombudsman Scheme was set up as a

statutory dispute resolution scheme under various provisions of FSMA. The opening page describes the purposes of the Decision Trees in the following terms, namely:

"The decision trees act as a reference guide for each nature of complaint, setting out the factors that should be consulted in reaching a decision on whether to uphold or reject a complaint and then suggesting appropriate types of redress".

The relevant Tree bears the reference number 25. It is headed "Inappropriate charges used in setting the premiums". An arrow leads from that heading to a box stating "Inappropriate charges (lower than own charges) confirmed to have been used in setting the premium". The box is joined by the word "and" to another box which reads:

"This is a material misrepresentation or alters the risk profile of the product such that the customer would not have chosen or should not have been advised to use this method of mortgage funding".

Yet another arrow leads from this box to another box which contains the words "uphold complaint". Pausing here, it will have been seen that what Mr Owen wanted to identify was whether firms had used "inappropriate charges". His request made no mention of whether and to what extent such charges entailed any form of misrepresentation or breach of contractual warranty.

7. In its letter of 31 January 2005 the FSA confirmed that the review which it had carried out in 2001 had identified 11 firms that have used standard LAUTRO charges for the period from 1982 to December 1994 (after which the rules governing the disclosure of charges were changed) and in which the FSA had judged that there had been a breach of contractual warranty. In its reply the FSA relied on 2 qualified exemptions contained in FOIA, namely law enforcement as stipulated by section 31 and commercial interests as provided for by section 43. As is clear already from this judgment the preliminary issue does not involve any further consideration of these exemptions and their applicability or otherwise to the facts of the requests.

8. The commercial background needs further explanation. The Tribunal draws this information largely from an editorial provided to it and drawn from the June 2005 issue of Money Management. LAUTRO was, as set out above, previously the

relevant regulator with regard to life assurance related mortgage products and between July 1988 and January 1995 it laid down standard expense rules to be used by life offices in calculating premiums in order to illustrate future benefits. Over that 7 year period during which the relevant rules applied, it seems that many, if not most, life offices had used higher actual charges than the LAUTRO imposed charges. From this it followed that all LAUTRO based premium levels would have been and/or were lower than the actual premiums required. To quote from the editorial in Money Management:

"So any policy using the LAUTRO premium levels would never reach the goal of paying off the mortgage even if the illustrated growth rate was achieved because the premiums would have been set too low right from the start. The only way this could be addressed would be if growth rates were at a higher level than illustrated."

9. The editorial went on to point out that 2 firms, namely Clerical Medical and Scottish Widows had by then already paid compensation whereas Standard Life would not be doing so. The editorial ended with the observation that:

"Shortfalls that can be attributed directly to bad legislation should be down to the regulator, and the FSA should not be able to wash its hands of the whole matter simply because it was then known by a different name".

10. By letter dated 18 May 2005 the FSA confirmed that it had conducted an internal review which upheld its earlier decision to rely upon sections 31 and 43 of FOIA.

11. By mid 2006 the Commissioner had engaged in an exchange with the FSA. In particular he asked the FSA which of the 11 companies apparently identified by the FSA had been approached by the FSA and had agreed to take remedial action. He also enquired as to what actions had been taken and if any actions had been taken, whether such actions had met with the FSA's expectations. By mid October 2006 the FSA confirmed to the Commissioner that 12 and not 11 companies had been involved in the review.

12. The Commissioner issued his Decision Notice in relation to Appeal 93 by a notice dated 7 August 2007. The Decision Notice bears the reference FS 50075781. By a letter dated 23 September 2006 the FSA had raised the argument that the request

fell foul of section 44 of FOIA. As to that argument the Commissioner found against the FSA and held that Section 44 did not apply.

13. At paragraph 19 of the Decision Notice and in referring to the 12 companies which the FSA had said were involved, the Commissioner noted the FSA's confirmation that each of the 12 companies had "voluntarily agreed" to compensate their clients. The Notice went on:

"The FSA did not therefore use its formal powers to publicly censure the companies as it considered that the breaches were rectified through the compensation payments."

14. Although this section of the Notice was addressed primarily to the Commissioner's finding that section 31 of FOIA did not apply, the Tribunal notes that the Commissioner specifically noted that the FSA had explained that much of the information it received from companies was provided "voluntarily", without the need to use the compulsory powers available under FSMA, and that the FSA had stated that "it will often share findings and agree remedial action with companies to provide it with information relevant to its monitoring function and secure agreement to remedy any problems it has identified at an early stage". The FSA had also confirmed that if a company "co-operates with this approach it does not expect to be the subject of the formal sanction of publicity". This in turn led to the FSA's concern that "disclosure of the names of companies now would potentially undermine the willingness of those companies, and regulated companies in general, to engage in open dialogue with it." The relevance of these contentions will become apparent later on in this judgment.

15. It is perhaps appropriate at this point to refer to the basic statutory scheme involved in FSMA and which forms the basis of the FSA's contentions that section 44 operates in this case. The primary statutory provision which the FSA has contended attracts the operation of section 44 is section 348 of FSMA. Section 348 is headed "Restrictions on disclosure of confidential information by Authority etc" and itself appears under a major heading which heads a group of sections headed by section 348 itself and bears the description "Disclosure of information". Section 348 provides as follows:

"(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;

(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 of the Competent authority;

Section 349 deals with exceptions applicable to section 348 and provides in relevant part as follows, namely:

"(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.

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(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; …"

16. At this point it is enough for the Tribunal to note that transitional provisions made under FSMA have the effect that information which was confidential under the rules of LAUTRO became subject to section 348 in due course. Section 352 of FSMA makes disclosure of information in contravention of section 348 an offence and as will become clear additional arguments were raised with regard to section 205 to 209 inclusive of FSMA. Section 205 is headed "Public Censure" under the title which defines Part XIV of FSMA which is itself headed "Disciplinary Measures". Section 205 provides that if the Authority considers that an authorised person has contravened a requirement imposed on him by or under the Act, the Authority may publish a statement to that effect. Section 206 deals with financial penalties and provides in round terms that if the Authority considers that an authorised person has

contravened a requirement imposed on him by or under FSMA it may impose on him a penalty. Section 207 is headed "Proposal to Take Disciplinary Measures" and provides:

"(1) If the Authority proposes –

(a) to publish a statement in respect of an authorised person (under section 205), or

(b) to impose a penalty on an authorised person (under section 206), it must give the authorised person a warning notice.

(2) A warning notice about a proposal to publish a statement must set out the terms of the statement.

(3) A warning notice about a proposal to impose a penalty, must state the amount of the penalty."

17. Section 208 deals with Decision Notices and provides that:

"(1) If the Authority decides –

(a) to publish a statement under section 205 (whether or not in the terms proposed), or

(b) to impose a penalty under section 206 (whether or not of the amount proposed),

it must without delay give the authorised person concerned a decision notice.

(2) In the case of a statement, the decision notice must set out the terms of the statement.

(3) In the case of a penalty, the decision notice must state the amount of the penalty.

(4) If the authority decides to –

(a) publish a statement in respect of an authorised person under section 205, or

(b) impose a penalty on an authorised person under section 206,

the authorised person may refer the matter to the Tribunal [ie the Financial Services and Markets Tribunal]".

18. Section 209 provides that after a statement under section 205 is published, the Authority must send a copy of it to the authorised person and to any other party who received a copy of the Decision Notice. Section 391 provides that neither the FSA nor a person to whom a warning notice or Decision Notice is given or copied may publish the notice or any details concerning it. It also provides that if the FSA issued a notice of discontinuance, such a notice must state that if the person to whom such a notice is given consents, the FSA may publish such information as it considers appropriate about the matter to which the discontinuance proceedings relate.

19. In relation to section 44, the Commissioner noted in the Decision Notice in Appeal 93 the FSA's arguments that a statutory bar "because of the safeguards placed on the FSA's statutory powers under sections 207 and 208 of FSMA". The Commissioner noted the FSA's contention that disclosure of the identities of the organisations requested would "circumvent" the process that the warning notice procedures prescribed by those sections involved. In other words to paraphrase paragraph 57 of the Decision Notice, the companies' names would be disclosed without those companies being able to appeal against any allegation that had been made or which had emerged in the course of the FSA's review. This was said to be "tantamount" to a failure to observe due process and entailed a breach or infringement of human rights considerations.

20. In paragraph 60 of the Decision Notice the Commissioner observed that he considered there to be a "significant" difference between a formal statement on non compliance published under section 205 and following of FSMA on the one hand and on the other disclosure following upon a FOIA request. Accordingly, the Commissioner found that there was no statutory prohibition in place attracting the operation of section 44.

21. The Commissioner also rejected reliance placed by way of analogy by the FSA on the possible breaches of Article 6 and 8 of the European Convention on Human Rights ("the Convention"). The FSA claimed that the requested disclosure "would carry with it a presumption of guilt or fault which the companies had not had the opportunity to properly defend against …". Although the Commissioner went on to observe that the FSA might be able to issue a caveat stating that such was not the case, it was nonetheless "questionable" how effective such a statement would be given the underlying finding or at least the implication of breach of the various companies' rights under Article 6. Whilst the Commissioner was sensitive to the reality of such an inference being drawn, the fact remained that the Companies retained a right to appeal. As for Article 8 and the protection of private life, the Commissioner was not persuaded that any breach of that Article was necessarily here involved.

Appeal 93: Grounds of Appeal and Reply

22. In the wake of the Decision Notice, the FSA lodged grounds of appeal. The grounds contained an expansion of the reasons why the reliance on section 348 in turn entailed the applicability of section 44.

23. The grounds made the following contentions which are material for present purposes.

    (1) "Certain facts" which related to the business or other affairs of the 12 regulated firms which were the subject of the request had since the date of the request become publicly available as a result of exchanges between the FSA and Mr Owen but only in anonymised form.

    (2) The names of the 12 firms themselves would relate to the business or other affairs of the identified firms and would therefore have been "received" by the FSA when carrying out its functions of monitoring compliance with regulatory requirements made under the Financial Services legislation; in consequence disclosure of the names of the 12 firms would involve a public disclosure of confidential information regarding those firms.

    (3) In the circumstances the FSA should not be prevented from relying upon section 348.

24. As for the third ground mentioned above, the Tribunal notes that although it is well established that the Tribunal can in an appropriate case allow reliance to be placed on an appeal on exemptions or grounds not raised before the Commissioner, it was common ground that the FSA could justifiably rely on the applicability of s.348 for the purposes of the preliminary issue.

25. The Commissioner submitted an extensive written Reply in response to the FSA's grounds of appeal. Without intending any disrespect to the careful way in which it was drafted, the Tribunal feels that the matters and arguments which it canvassed were all raised and considered during the hearing of the preliminary issue and will be considered in detail below.

Appeal 100: Background

26. The essential background for the request in this appeal can be found in an FSA Press Release dated 24 May 2005 which had as its heading:

"The [FSA] has discovered that many financial advisers are giving poor quality advice to consumers on equity release".

The Press Release went on to say that since the Autumn of 2004 the FSA had found that in excess of 70% of advisers were not gathering enough information about their customers before offering them advice on equity release. The FSA had also found that once a lifetime mortgage had been sold, consumers were being advised to invest some of the equity released in products that were not suitable for their needs. It related that the FSA had, following late 2004, carried out an exercise involved 42 "mystery shopping" exercises which had involved visits or calls to product providers, IFAs and mortgage brokers, to assess the standard of advice within the relevant market. A second exercise had involved firm visits and "desk-based" research which had looked "closely" at subsequent investment advice provided to customers of 7 firms active in that market. With regard to this second exercise it appeared that 7 firms had been "looked at" in relation to which the overall finding was that advisers had failed to explain the link between advice regarding equity release related borrowing and subsequent investments.

27. The Press Release was accompanied by a briefing note also dated 24 May 2005 which specified that the 42 mystery shops had related to 20 firms. The FSA had used an external mystery shopping agent. The exercise had taken place between December 2004 and March 2005 being conducted both by telephone as well as by means of face to face meetings in the mystery shoppers' homes. As for the second exercise, which concerns subsequent investment advice, the briefing note confirmed that 4 visits and 3 desk based reviews were carried out between January and early May 2005 "looking at around 140 individual client files across seven firms".

28. The request took the form of an email dated 27 May 2005 and dealt with both exercises. The request was made by a Paul Lewis as Presenter of a BBC programme called "Money Box". He made a request for:

    "1. A list of the firms which were used for the mystery shopping exercise.

    2. The results of that exercise by firm.

    3. The results of that exercise by adviser.

    4. The identities of the seven firms investigated on subsequent investment advice.

    5. The results of that exercise by firm.

    6. The results of that exercise by adviser."

29. The initial response of the FSA applied section 44 to all the requests save for requests 1 and 4 to which it applied the qualified exemption in section 43 of FOIA which deals with commercial interests. The FSA claimed that use of the mystery shopping exercise was a "diagnostic tool used by Retail Intelligence and Regulatory Themes in the discharge of the FSA's functions, including monitoring the compliance of firms with regulatory requirements" adding that any information received by FSA from the market research firms was "deemed confidential".

30. The letter confirmed the results of the review adding that on account of section 348(3)(a) "volunteered" information as well as "received" information was treated as confidential. This contention was no doubt made on the basis of the word "provide" in that sub sub section. In subsequent exchanges with the Commissioner in March

and August 2007, the FSA maintained that with regard to the list of names sought in Request 1 the same information was "received" from the mystery shoppers thus attracting the operation of section 348 and therefore section 44, even though the FSA chose the majority of the firms to be mystery shopped, but with the others being small mortgage brokers having been chosen "by some of the mystery shoppers as the firms operated in their local area". The second exchange addressed the second exercise and the FSA claimed that although the information sought was in the words of the FSA "internally generated" the same still constituted "received information".

31. The Commissioner's Decision Notice in Appeal 100 is dated 16 August 2007. It bears the reference FS 500 94595. Before turning to the relevant extracts, the Tribunal points out that for the purposes of the determination of the preliminary issue the relevant requests are those which sought 2 lists of firms which were mystery shopped and further investigated, ie items 1 and 4 in Mr Lewis' request. At paragraph 20 of the Decision Notice the Commissioner found that the list of firms which were mystery shopped did not constitute information "received" by the FSA insofar as the list of names selected by the FSA used were concerned. The same merely constituted a list of names it selected due to its knowledge of the market. On the other hand the Commissioner did find that the names of the firms selected by the mystery shoppers could be said to have been received information for the purposes of section 348. The Decision Notice therefore directed that there should be disclosure of the names of firms selected by the FSA for mystery shopping as well as the names of the firms further investigated, but not those chosen by the mystery shoppers themselves.

32. The Grounds of Appeal are dated 14 September 2007. The Grounds took issue with the determination of the Decision Notice contending that all the relevant requested information, including the list of names chosen by the FSA to be mystery shopped, represented information "received" by the FSA.

The evidence

33. The Tribunal received written statements and heard oral evidence from 2 witnesses submitted on behalf of the FSA. One witness statement and the corresponding evidence was presented on a open basis and was done so by Ms Victoria Raffé, the

present head of department in the FSA's Strategy and Risk Division although her witness statement exhibited a number of closed documents on account of the latter, but she also gave evidence in closed session. The second witness statement comprised a closed witness statement and closed supporting material and was provided by Attricia Archer, presently the manager of a team in the Banking and Mortgage Department of the Retail Firms Division within the FSA. However, at the time of the events which form the background to the requests in both appeals, both witnesses were engaged with the FSA's policy and supervision team regarding mortgage endowments.

34. In her witness statement Ms Raffé addresses the issues in Appeal 93. She exhibited documents regarding a particular firm called Firm A, chosen by way of example which related to the review and subsequent negotiations which the FSA conducted with that firm. She confirmed that in the period which concerned that firm, namely from 1998 onwards and in particular during 1998 and 1999 the FSA asked for and received from a large number of firms, including the 12 firms which formed the subject matter of the request, a wide range of marketing and product literature including premium quotations as well as information regarding charges in fact applied. In the case of Firm A whose exchanges form the basis of her exhibit Ms Raffé confirmed not only that actual charges exceeded the projections given to customers but also that Firm A together with the other firms had committed either a breach of warranty or a misrepresentation at the time of the sale of the policies. In the event in 2004 Firm A agreed to provide compensation to its affected customers. Ms Raffé in her statement and evidence confirmed that the same approach was "substantially mirrored" in respect of the other 11 firms.

35. However, she added that in the wake of the original request in Appeal 93 the FSA received correspondence which showed that not all of the 12 firms in question agreed with the FSA's conclusions. One firm which was referred to as Firm B denied that any breach of warranty or misrepresentation had occurred. Another firm called Firm C claimed that it had set up a compensation scheme prior to the FSA's review. Both firms, therefore, maintained that they should not have been among the 12 firms otherwise the subject of the request.

36. Finally, in her witness statement Ms Raffé confirmed that since the issue of the Decision Notice in Appeal 93 the FSA had learned that one firm which she named as Scottish Widows had issued a press statement in April 2002 confirming that it had applied charges higher than the LAUTRO charges and that it would in consequence be adding "bonus amounts" to all affected parties. The FSA therefore accepted that information to the effect that Scottish Widows was one of the 12 firms addressed by the request was, therefore, already in the public domain and was therefore no longer "confidential" for the purposes of section 348.

37. As will become apparent below, the Tribunal is of the view that the real importance of Ms Raffé's evidence lies in the contents of the closed extract which related to various detailed exchanges between the FSA and Firm A. By mid-July 2000 there had been an internal review of the work that had already been carried out regarding the charges attaching to endowment mortgages. The analysis up to that point had been conducted in large part at least it seems by a certain individual, or at least by a tiny team within the FSA. Although the review was based on data provided by the firms themselves, eg the level of charges in fact imposed, the internal review dated 27 July 2000 contained passages which dealt with so called "Action Points" which addresses the need to confirm the significance and potential implications of the material supplied, the research required with regard to identifying the firms concerned, the research required identifying policy volumes and the need for a specified FSA employee to a draft paper for submission to a working party.

38. Admittedly, the firms in question were asked for a variety of information, in particular growth rates, but also critical matters such as a review of the size of policy holders potentially affected by the relevant discrepancies clearly raised issues which the FSA undertook to analyse and which it did in fact carry out. In a so called Background Note dated it seems 10 January 2001 with regard to Firm A, following a review of the basic information provided by that firm, the following passage occurs, namely:

"There is no explanation of the basis of calculation of the premiums indicating the actual meaning of the reduction in yield figures including the implications on the required growth rate. This might reasonably be expected to be provided by the product provider in the promotional material in the discharge of his duty of care towards the customer, and as there is a breach here, it would seem to constitute a

misrepresentation of the expected benefits based on the premiums being paid into the policy. Although there are references to the possibility of future premium increases, it cannot be expected that the clients will have known this could occur as a result of the use of LAUTRO charges in premium setting, therefore this firm should be classified as providing a contractual warranty."

39. Another detailed memorandum produced internally by the FSA and dated 11 January 2001 (repeated in effect in a later memorandum dated 12 April 2001) showed how the analysis evolved. It recounts that in a 1998 FSA endowment survey, offices were required to state the charges used in premium calculations together with the growth rates used. 16 out of 59 firms had been identified as having used LAUTRO expenses during the review period July 1988 to December 1994. This usually meant resultant lower premiums and as a consequence of which a higher growth rate was required in order to achieve forecasts. It transpired that some firms were omitted in the 1998 survey. A subsequent survey revealed and uncovered a "total population of potentially 21 firms" that had used LAUTRO charges. It also showed that 11 had used an excessive growth rate and that 12 had used both. Of the 21 firms referred to, 5 had arranged to compensate clients at that stage and a further 2 had submitted proposals for compensation. The total cost of the compensation paid by the 5 firms referred to was in the region of £100 million. The same memorandum made it clear that the issue was not seen in isolation as a pure premium issue. The FSA had instead centred its approach on whether the product could actually deliver what it was supposed to deliver, ie was it fit for its purpose and how was it presented to the client. This had involved the FSA examining the marketing literature "from both a legal and actuarial perspective". In particular this had involved consultation with Leading Counsel, who had amongst other things advised that a particular firm could avoid a determination that it had entered into a contractual warranty if it could show that it had sufficiently indicated the need for the product to achieve a higher growth rate.

40. The upshot of the FSA reviewing the material provided by the firms in the way it is described in paragraph 17 of this Memorandum was set out as follows, namely:

"A detailed analysis of the documentation relating to LAUTRO charges on a firm by firm basis has been conducted with each firm receiving a priority rating as well as an

initial assessment grade. From this analysis it has become evident that some firms can be moved out of the potential action group due to there being no evidence of a misrepresentation and no detriment."

41. The FSA, therefore, expressed its intention to draft a standard letter tailored to each individual firm's circumstances. This course, it was hoped, would elicit proposals from the Companies affected as to how compensation would be effected.

42. A further detailed reflection of the work undertaken by the FSA can be found in an internal memorandum dated 17 July 2001 prepared it seems by Ms Raffé and sent to the FSA's Mortgage Endowment Project Board. The purpose of the memorandum is set out as being "a proposed decision process for LAUTRO charges for discussion, in order to settle definitively a way forward that can be applied to all firms." Various flow charts are attached to the memorandum. They are summarised at paragraphs 5 and 6 as entailing possible discipline where all of the following elements applied, namely when it was proportionate to require firms to provide redress to customers and the firm refused to propose an acceptable redress package as well as where investigation by the FSA's Enforcement Team had revealed "culpability". Conversely, discipline would not be applied if either the firm had agreed to an acceptable redress package or it was not proportionate to require redress.

43. This memorandum then went on to consider 2 options to ensure such redress as was required. One was to compel a delinquent firm to make restitution under FSMA and the other was to oblige companies to conduct business in a way which took policyholders' interests into account by means of a form of intervention. The memorandum concluded at paragraph 15 with the following passage, namely:

"The difficulty with [a requirement for redress] is that we do not yet have sufficient information in respect of the number of cases affected, the actual growth rates used and the firm's investment performance in order to determine whether redress would be payable taking into account proportionality and de minimus [sic] levels. In particular, information in respect of the number of cases and the growth rates used has, in some cases, been provided by grouping cases together within a growth rate range. This does give a worse case scenario but does not allow the exact number of cases affected to be identified including the extent of "excessiveness" of the growth

rates used. The firm's investment performance is also required to enable calculations of the amount of compensation due to be carried out."

44. The memorandum, therefore, recommended that there should be a delay of the assessment of appropriate redress but that invitation be extended to affected firms to start thinking about so called pre-1985 excessive growth rate cases.

45. A more formal document entitled "Mortgage Endowments Product Flaws" and bearing the date July 2001 in effect again reviewed the work and analyses which the FSA had by that date carried out. This paper ended with the following passage headed "Chapter 7: Communication" which read as follows, namely:

"The use of standard LAUTRO assumptions for the calculation of premiums is an historic issue as the problem disappeared with the introduction of the January 1995 Disclosure regime. It is not, therefore necessary to undertake any form of guidance in this area. However, FSA is committed to making some form of public announcement on the work that has been undertaken in this area. This announcement will communicate the firms that have compensated in this area and highlight the issue for the investors, although it is acknowledged that due to the complexity of the issue this will be a difficult message to deliver".

46. By mid to late 2001 further memoranda exhibited to Ms Raffé's statement showed that the FSA had identified 19 firms which were thought to be subject to "product flaws" insofar as that expression denoted the use of LAUTRO charges. This remained the position in March 2002 when another FSA internal memo of 21 March 2002 noted that there were 19 firms where LAUTRO charges were "an issue" with the estimated compensation being £274 million with over 600,000 policies affected. It was noted that of the 19 firms affected, 2 had paid compensation, 5 had arranged voluntary compensation, 1 was in the process of compensating all policies while 4 were compensating "in force only (excluding surrenders)". Insofar as Excessive Growth Rates were concerned, there were 11 firms affected with 5 firms being affected by what was called the misrepresentation issue. Firm A though not accepting that it had been guilty of any breach of contractual warranty (an allegation, it seems, later retracted by the FSA) or any misrepresentation accepted that there was a problem which justified some form of compensation package to reflect

policyholders' reasonable expectations. Exchanges between the FSA and Firm A were extremely protracted. Negotiations were still ongoing in December 2003 when Firm A put forward detailed proposals to effect compensation but subject to a number of conditions which included a refusal to admit liability and the absence of any publicity and/or FSA enforcement action. In the event according to an exchange in July 2004 which Ms Raffé exhibits, it appears that these conditions were accepted by the FSA.

47. In her closed witness statement Ms Archer explained what she called the "discrepancy" as between the 12 firms which had been referred to in the FSA's exercise which had been conducted in or by mid 2000 and the 19 firms referred to in the July 2002 memorandum which had been entitled "Mortgage Endowments Product Flaws". She explained that in the context of Appeal 93 the FSA had interpreted the phrase "inappropriate charges" in the request as restricted to cases where the FSA considered a breach of warranty had occurred and this excluded other firms where it had been thought that a misrepresentation as distinct from a warranty claim was involved. In fact, as indicated above, although the body of the memorandum referred to a total population of 21 firms that had used LAUTRO charges, the appendices to that memorandum set out the detailed position with regard to 19 firms only.

48. It follows that if the term "inappropriate charges" can be regarded as wide enough to encompass cases where the FSA alleged both a possible misrepresentation as well as a possible breach of contractual warranty then the list of names provided to the Commissioner should have reflected the 19 firms whose detailed data were appended in the appendices to the July 2001 memorandum. If the use of the term "inappropriate charges" is treated as reflecting those firms which had used LAUTRO charges irrespective of whether they used an excessive growth rate then as the memorandum of 12 April 2001 explained, the FSA was addressing what it called a "total population of potentially 21 firms".

Appeal 100: further evidence

49. The Tribunal received a bundle of closed documents from the FSA regarding the information sought in relation to this Appeal. In its exchanges with the

Commissioner, the FSA confirmed that it had "mystery shopped" 19 firms, one of which was unnamed.

The issues

50. The issues canvassed during the hearing of the preliminary issue concerned the scope of the request, the proper ambit of section 348 and the effect of disclosure to the extent that the last issue entailed separate consideration from the issues raised by the second issue.

51. The request in Appeal 93 has been set out above already. Some discussion has already been had regarding the true meaning and ambit of the phrase "inappropriate charges". It might be thought that even against the context of the relevant Decision Trees, there could be said to be an ambiguity or at least a lack of precision in the request.

52. The Tribunal, however, finds that there can be no real doubt about the meaning of the request. It is enough in the Tribunal's view to have regard to the FSA's own considered reaction to the request in its letter of 31 January 2005 to Mr Owen. As was pointed out in the Commissioner's submissions, the FSA recognised that at least 3 elements were reflected by the phrase "inappropriate charges". First, it denoted the application by firms of standard charges as required by the relevant LAUTRO rules, second it implied a failure by such firms to take available measures to reflect the actual charges applied to the policies in question and third, it denoted a resultant misrepresentation and/or breach of contractual warranty. The Tribunal agrees that if another ingredient were involved or denoted by the phrase in question it would flow from the third element and would involve the act of compensation effected in favour of affected policyholders. The justification for the importation of this final element, if it be not already a necessary corollary of the third element, seems entirely justified by the context of the FSA's own grounds of appeal which expressly recognised that one of the facts that had by then "become publicly available" though only in an anonymous form was the fact that the 12 firms referred to "had voluntarily agreed to compensate their clients".

53. If further confirmation were required of this characterisation of Mr Owen's request it can clearly be found in the reply sent by Mr Owen in which he made it quite clear that

what he was seeking was "whatever information this review revealed". It follows that there can be no real doubt about the proper ambit of the request in Appeal 93. There is no issue surrounding the true meaning or extent of the request in Appeal 100.

54. Reverting to Appeal 93, there was no dispute on the following matters. Section 348 constituted a prohibition on disclosure within the meaning and ambit of section 44 of FOIA. In relation to Appeal 93 and the extensive review carried out by the FSA it received information from the firms involved and that information was covered by section 348 as confidential information. Such information clearly only related to the relevant firms' businesses but it had not been made available to the public within the meaning of section 348(4)(a) of FSMA. In addition such information as has been disclosed by the FSA in its response as well as by the Commissioner did not infringe section 348 as the disclosure was "so framed" that it was not possible "to ascertain from it information relating to any particular person".

55. As to the scope of section 348 there can be no doubt and if necessary the Tribunal so finds, that information relating to the business or other affairs of any person which is received by the FSA while carrying out its statutory functions cannot be disclosed without consent. The prohibition is absolute in the sense that no showing of detriment as regards the person to whom it relates or any other party is required. In the words of the Court of Appeal in *Real Estates Opportunities Limited v Aberdeen Asset Management Jersey Limited* [2007] 2 All ER 791 at paragraph 31 the information which is protected represents "information which may be of importance to the regulator for the purpose of exercising its regulatory functions." (See generally paragraphs 31 to 34 inclusive).

56. The Tribunal was presented with three general propositions put forward by the FSA. First, it was submitted that the section covers not only the disclosure of information on the same terms as the terms in which it was received, but also information which disclosed the substance of the confidential information. Second, in some cases the substance of any information disclosed will necessarily be affected by the context of the disclosure, eg if it could be linked to other information already disclosed. Third, it was said that section 348 will not prohibit the disclosure of matters of opinion or evaluation reached by the FSA in relation to a firm only if such disclosure will not implicitly disclose confidential information received from those firms.

57. As is perhaps already clear and as will be addressed further below it is the third contention which is central to the determination of the preliminary issue. The first and second contentions do not in the Tribunal's view represent contentions which can be justifiably objected to. In an earlier decision of this Tribunal, namely *Slann v Information Commissioner* (EA/2005/0019) the information requested was held not to be disclosable since it constituted further information connected to information already available which would have enabled otherwise confidential information to be revealed or at least be extrapolated. As for the second proposition much the same thought process as was illustrated by the *Slann* case applies. Reference could be made in this connection to section 348(4)(b) which shows that anonymised information can be disclosed unless it leads to the "ascertainment" of other information which is otherwise confidential.

58. Reverting to the third proposition and focusing more upon the present case the FSA submitted that if a firm had been requested to produce information about the sale of a mortgage endowment policy each of the following "conclusionary" statements would entail a wrongful disclosure of the information requested. The four such statements in the words of the FSA's submissions were as follows, namely:

    (1) Firm A used LAUTRO charges to set the premium charges;

    (2) Firm A did not disclose to the customer the effect of using LAUTRO charges to set premiums;

    (3) Firm A was in breach of warranty with regard to the customer or committed a misrepresentation towards the customer; and

    (4) Firm A is liable to compensate the customer for the shortfall.

59. The Tribunal was referred to a decision of Lightman J in *Melton Medes Limited v SIB* [1995] Ch 137. At pages 149D and 161B the learned Judge in effect recognised and restated the first and second propositions referred to above and in the latter section alleged that "mere expressions of opinion" were outside the predecessor section to section 348. However, as the FSA pointed out, the expression of opinion in that case did not impliedly disclose the information received. Needless to say that decision did not involve a FOIA request. It should be noted that Lightman J stated at 149C to G

that “Disclosure of what is a mere possible deduction from information is not as it seems to me, at least in this context, disclosure of the information itself.” As has been indicated above the Tribunal finds that Mr Owen’s request did not on any view seek “confidential information” “received” by the FSA. Insofar as the analysis carried out by the FSA constituted a “possible” deduction from information it received the Tribunal gratefully adopts Lightman J’s conclusions that “any hint as to that information implicit in [the] question was quite insufficient to constitute disclosure.” (See again 149C-G).

60. The crux of the problem with regard to the third proposition in the Tribunal’s judgment involves a proper analysis of the work carried out by the FSA in the light of the particular circumstances in Appeal 93. The FSA contended before the Tribunal that consideration must be given to what it called the effect of the disclosure of the information in the context of information which had already been disclosed by the FSA and the information commissioner.

61. With great respect the Tribunal disagrees with this contention and its implications. Mr Owen wanted to know which providers were “at fault” and hence his reference to the Decision Trees. The information sought related to the fact and degree of fault committed or arguably committed by the firms involved. The FSA carried out an elaborate exercise to assess the fact and extent of such default. In *Slann* it would have been possible to effect a trail leading back to the confidential information which was in issue. That trail was extremely clear. In the present case the firms did not in the Tribunal’s view provide the information which was in reality being sought by Mr Owen. Moreover, the information trail above referred to which existed in the *Slann* case cannot be said to apply to the facts of the present case. Moreover, there is nothing in FOIA which has regard to any link or possible relationship between any information which is the subject of potential disclosure and any information already in the public domain. To that extent, therefore, the Tribunal rejects the FSA’s general contention that consideration must necessarily be given to the effect of disclosure of the names of the firms in the context of information which had already been disclosed.

62. In its written submissions the FSA claimed that disclosure of the firms’ names would lead to disclosure not only of the existence of a warranty claim or alternatively one

based on misrepresentation but also to the revelation of the fact that each firm in question had agreed with the FSA to effect some form of compensation or a similar means of redress. Whether or not the ambit of Mr Owen's request was broad enough to encompass a request as to which firms had paid compensation or effected a similar means of redress, the fact remains that the arrival of that conclusion or similar conclusion was one which was a necessary by-product or result of the analysis carried out by the FSA, after receipt of the information.

63. In the Tribunal's judgment this approach is vindicated by the words of section 348 themselves which talk of information being "received by the primary recipient": see section 348(2)(b). The information here requested by Mr Owen cannot in any way be said to have been "received" by the FSA.

64. The Tribunal, therefore, accepts the Commissioner's contentions that no "trail" as is described above similar to the trail illustrated by the *Slann* decision is applicable in the present case. Disclosure of the names of the firms would not enable the requester to discover whether the "inappropriate charges" used were LAUTRO charges or to determine what was the period of time during which, if they were used, LAUTRO charges were in fact used. Nor would such a disclosure enable the requester to discover what the particular firms' own charges were or indeed lead the requester to be able to understand what the growth rates were quite apart from the fact that disclosure that LAUTRO charges were in fact used would not of itself have constituted confidential information.

65. The Tribunal was presented with a spectrum of possible disclosure "scenarios" by the Commissioner ranging from cases in which disclosure would be prohibited to those in which no prohibition would be involved. With respect to the careful way these were represented, the Tribunal does not feel it at all appropriate or necessary in this case to investigate the range of possible circumstances where disclosure might or might not apply. It has reached a clear determination on the particular facts with regard to the request in Appeal 93. The Tribunal does, however, note and accept two additional factors pointed to by the Commissioner in relation to the process that constituted the FSA's analysis. First, a number of firms appear to have protested against the characterisation levelled against them as a firm or firms which fell foul of the characterisation illustrated by the relevant Decision Tree which indicates that, as

a matter of logic, this could not have been the information received from those firms and secondly, even the FSA itself accepted that its own characterisation was not watertight and that it or some other tribunal could or might reach a different conclusion.

66. As indicated above the FSA contended strongly that any disclosure such as the one requested in Appeal 93 must be considered in the light of any other information which had already been disclosed and which related to the same subject matter. The Commissioner responded basing reliance on the clear words of section 348(4)(b) rejecting such an apparently wide-ranging approach. Some time was taken up at the hearing in dealing with these issues but given the Tribunal's clear finding with regard to the effect of the exercise carried out by the FSA it does not propose to address that particular contention further in the context of Appeal 93 although the same will be revisited in the context of Appeal 100.

67. Yet another contention made by the FSA refuted a suggestion made by the Commissioner that it, ie the FSA, was now relying on information having been provided under some form of agreement with the firms. Insofar as it needs to address this issue, the Tribunal would agree with the Commissioner that insofar as there was any form of agreement between the FSA and the firms or any firm the same information cannot in any way be said to have been at any stage "received" by the FSA. See eg *Derry City Council v Information Commissioner* (EA/2006/0014) at paragraph 32(c) to the effect that a party to an agreement cannot "obtain" information contained in that agreement.

68. The fact remains that as Miss Raffé made clear it was the FSA which evaluated the likelihood of an insufficiency as regards customers' returns which led to it generating the names of those firms which were thereby implicated as "relevant firms". From the evidence the Tribunal has heard and seen it does not seem that those firms themselves ever informed the FSA that customers' returns were likely to be insufficient. The valuation exercise which involved a showing that the level of premiums quoted would be insufficient to achieve the envisaged return was long carried out by the FSA with its advisers. In particular the Tribunal notes that in the case of Firm A the material relating to which was in the closed bundle, Ms Raffé confirmed in her witness statement that the FSA's own analysis in fact changed from

one which suggested a breach of warranty to one which resulted in a finding of misrepresentation.

69. Turning to Appeal 100, Mr Lewis sought a list of the firms used for the mystery shopping exercise as well as a list of the firms investigated. As has been indicated above in his Decision Notice the Commissioner found that the names of the firms chosen by the FSA which were mystery shopped did not constitute "confidential information" as it had not been "received" by the FSA. Rather it represented a list of names selected by the FSA itself. The Commissioner also found that the names of the 7 firms selected by the FSA for further investigation was also not "received" information. The same was not true, however, of the firms selected by the mystery shoppers.

70. The Tribunal has no hesitation in endorsing the Commissioner's conclusion that insofar as the names were selected by the FSA it cannot possibly be contended that the names were "received" by the FSA.

71. The sole ground put forward by the FSA is that disclosure of the information sought coupled with the related Press Release set out above would enable readers to draw conclusions about the activities of the named firms.

72. This argument has been touched on above at paragraph 66 in relation to Appeal 93. What was called in argument a "composite" approach took the form of a contention by the FSA that revealing the names sought against the background of the press release would be a contravention of section 348. Particular regard was paid in that respect to section 348(4)(b), since there would be anonymised information released in the first instance following by revelation of the firms' names at a later stage which would "complete the jigsaw". The Tribunal rejects this contention and accepts the Commissioner's argument that section 348(4)(b) refers to whether or not it is possible to ascertain from the disclosed information itself ("from it"), information relating to a particular party. Section 348(4)(b) does not refer to whether it is possible to ascertain from "it [the disclosure] taken with any information in the public domain" information relating to that particular person. To paraphrase the Commissioner's written submissions there is nothing in the language of section 348 which suggests that

anything other than the information itself, self-contained and self-referential, is to be considered.

73. In addition the Tribunal accepts that it would not be possible to identify from the names of all the firms mystery shopped which firms had been identified as failing in any particular respect. Again to paraphrase the Commissioner's written submissions disclosure of the names sought would not reveal information about any particular firm's business or affairs. Accordingly, disclosure of the names could not be prohibited by section 348 in any event, even if contrary to the Commissioner's submissions, each name had been received from a particular firm.

74. For all the above reasons the Tribunal upholds the Commissioner's decision in Appeal 100 and rejects the FSA's claims in that respect.

Sections 205 and following of FSMA

75. Section 205 and following confirms that the FSA enjoys what is called a power of public censure. Before that power is exercised the party which is the subject of possible censure must be given the ability to state his or its case and if necessary, given the ability to appeal to the Financial Services Markets Tribunal. Section 207 provides that should the FSA propose to publish some form of censure it must prior to that time issue a warning notice. Following any representations, the next stage will be a decision notice. The relevant provisions have been set out above and the applicable provision is section 208 of the Act: see also section 388 of the same Act.

76. A final notice will be issued if a decision notice has not been referred to the Tribunal. Equally it will be issued following Tribunal proceedings. In both cases it will be published. There is in section 391 an express prohibition on the publication of the contents of warning and decision notices.

77. The FSA claims that in Appeal 93 disclosure of a firm's name will entail disclosure of what in effect will be a finding that the firm has used "inappropriate charges" and has been held liable to compensate customers. For this purpose the Tribunal is prepared to assume that this last fact would necessarily be inferred. In such circumstances the FSA contends that the necessary safeguards as to due process will have been ignored. The same argument is put forward with regard to Appeal 100.

78. Particular reliance is placed on the Decision Notice in Appeal 93 in which the Commissioner recognised that disclosure of the firms' names would imply some degree of fault. The fact that a firm or a number of firms had chosen to enter into an informal settlement did not, it was claimed, change matters at least where there had been no clear and unequivocal waiver of what amounted to rights protected by Articles 6 and possibly 8 of the Convention.

79. The Tribunal again has little hesitation in rejecting these contentions and upholding the Commissioner's findings for the following reasons. First, the FSA cannot point to any specific breach of the detailed provisions of section 205 and following. It merely asserts that disclosure would be "tantamount" or "equivalent" to publication. Secondly, the FSA's submissions talk in terms of "public censure". The legislation refers to a number of very specific types of notice. It is simply not clear what level or type of notice is being addressed by the use of that phrase which is not a phrase that appears within the text of the legislation itself other than by way of heading. Third, the FSA is in effect elevating section 205 and following as well as sections 387 to 388 inclusive to some form of prohibition upon disclosure. In the Tribunal's judgment it is simply not possible to construe those provisions in that way. Moreover, even if section 391 did contain the prohibition on the publication of the "notices" it has no application to the entirely different processes contained in and prescribed by FOIA.

80. With regard to the attempt by the FSA to elevate the processes prescribed by sections 205 and section 387 etc to a form of prohibition note has to be taken of the phrase in section 44 "prohibition by or under any enactment". On any basis as the Commissioner submitted such an enactment must be clear. By way of support for the proposition that a clear wording is required to constitute a proper statutory prohibition of the type envisaged by section 44 the Commissioner cited *R v Enfield London Borough Council and Secretary of State for Health ex parte J* [2002] EWHC 432 (Admin) where at paragraph 57 Elias J stated that cases where a prohibition could arise "by necessary implication" in circumstances stopping short of a clear and express legislative provision "would be very rare". The Tribunal notes that section 44 itself is unequivocal in stressing that the relevant prohibition must be "under an enactment".

81. Admittedly, section 391(1) of FSMA contains a prohibition on the publication of a warning or decision notice. However, the Tribunal accepts the Commissioner's submission that this prohibition has no application to the disclosure of information where no such notice or notices have been issued. Moreover, contrary to the clear wording of section 348, section 205 contains merely a discretionary power which is vested in the FSA.

82. Finally, it perhaps goes without saying that far from having taken any decision to publish any formal order under section 205 and following the FSA chose not in any of the present cases to do so.

83. On a related note the FSA relied on an agreement or series of agreements which apparently had been reached with the firms that no enforcement action would ensue coupled with an assurance that no publicity would take place. The Tribunal again agrees with the Commissioner that even if this constituted some form of waiver this stopped well short of contracting out of the obligations expressly provided for by FOIA. As is pointed out at the outset of this judgment the findings with regard to the preliminary issue have no bearing whatsoever on other exemptions which are or might be relied on by the FSA in connection with both Appeals.

84. For the above reasons, the Tribunal rejects any reliance by the FSA on the possible applicability of sections 205 and following of FSMA as well as section 391 of the same Act.

European Convention on Human Rights

85. Finally, although the argument was not strongly pursued during the hearing, the FSA invoked reliance on Article 6 and 8 of the Human Rights Convention.

86. The Tribunal finds that nothing in the disclosure of the information requested by Mr Owen could be said to be a determination of any civil rights or liabilities of or concerning criminal charges against the firms for the purposes of either or both of the said Articles. The FSA's argument in this respect is in effect a re-run of the arguments advanced in connection with sections 205 and following and sections 391 of FSMA. The firms' informal arrangements struck with the FSA constituted a voluntary choice on the part of those firms. They did not reserve their Article 6 and/or

Article 8 rights. The Tribunal therefore entirely endorses the approach taken in the Decision Notice in Appeal 93 to the effect that nothing in the disclosure of the information requested or with regard to any informal settlement arrangement was in any sense dispositive of any human rights or other analogous rights. Moreover the Tribunal has already found in *Bluck v Information Commissioner* (EA/2006/0090) that Article 8 does not constitute or reflect any form of prohibition for the purposes of section 44 of FOIA. If such were to constitute an erroneous conclusion this Tribunal would find any Article 8 infringement in Appeal 93 duly proportionate and justified.

Conclusion

87. For all the above reasons the Tribunal determines the preliminary issue in favour of the Commissioner.

Signed:

David Marks
Deputy Chairman

Date 13 October 2008