



Tribunals Service
Information Tribunal

Appeal under section 57 of Freedom of Information Act 2000

Information Tribunal Appeal Number: EA/2008/0047
Information Commissioner's Ref: FS501234488

**Heard at Care Standards Tribunal,
London, SE1 0BW
On 17 November 2008**

**Decision Promulgated
25 November 2008**

BEFORE

CHAIRMAN

Murray Shanks

and

LAY MEMBERS

Pieter de Waal and Gareth Jones

Between

FINANCIAL SERVICES AUTHORITY

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

RIVERSTONE MANAGING AGENCY LTD

Additional Party

Representation:

For the Appellant: Charles Flint QC and Jason Coppel

For the Respondent: Jane Oldham

For the Additional Party: Helen Mountfield

Subject areas covered:

Public interest test s.2

Duty to advise and assist s.16

Refusal of request s.17

Commercial interests/trade secrets s.43

Case referred to:

DBERR v Information Commissioner (Friends of the Earth, additional party) EA/2007/0072

Decision

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 14 April 2008.

Information Tribunal

Appeal Number: EA/2008/0047

SUBSTITUTED DECISION NOTICE

Dated 25 November 2008

Public authority: Financial Services Authority

**Address of Public authority: 25 North Colonnade
Canary Wharf
London E14 5HS**

Name of Complainant: Michael Holman

The Substituted Decision

For the reasons set out below, the substituted decision is as follows:

- (1) the Public Authority dealt with the request in accordance with the requirements of Part I of the Act;
- (2) no step is required to be taken.

Dated this 25th day of November 2008

Murray Shanks

Deputy Chairman, Information Tribunal

Reasons for Decision

Background

1. Michael Holman, who made the request for information in this case, was a member of Lloyd's syndicate 271, which wrote aviation hull insurance in the 1998, 1999 and 2000 years of account. In 2003 those years of account remained open and there were very large exposures, in particular on the 2000 year of account resulting from the events of 11 September 2001.
2. In November 2003 a "re-insurance to close" transaction was put into effect in respect of the three outstanding years of account. The arrangements were complex but the main features were as follows:
 - (1) syndicate 271 entered into re-insurance contracts with Riverstone Insurance (UK) Ltd and others, which were themselves re-insured by other subsidiaries of Fairfax Financial Holdings Ltd, the ultimate parent of companies in the Riverstone group (which we shall refer to compendiously as "Riverstone");
 - (2) a new syndicate 3500 was established and the syndicate 271 open years of account were re-insured to close into the new syndicate;
 - (3) the managing agent of syndicates 271 and 3500 (Kingsmead) was acquired by Riverstone and re-named Riverstone Managing Agency Ltd (RMAL).
3. Not surprisingly the re-insurance to close transaction required approval from Lloyd's. Although it was so approved, Mr Holman and other members of syndicate 271 were critical of the transaction because they believed that the closure was premature and that the premiums they were having to pay were excessive.
4. Lloyd's regulation of its own insurance market was itself subject to supervision by the Financial Services Authority (FSA) under Part XIX of the Financial Services and Markets Act 2000 (FSMA) so that the FSA was also involved in the approval process.

5. The FSA is a public authority for the purposes of the Freedom of Information Act 2000 but its ability to disclose information thereunder is substantially curtailed by section 44 read with section 348 FSMA which provides so far as material:

(1) Confidential information must not be disclosed by [the FSA]...without the consent of-

(a) the person from whom [the FSA] 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; [and]

(b) was received by the [FSA] for the purposes of, or in the discharge of, any [of its] functions ... under this Act...

The request for information

6. On 20 October 2005 Mr Holman wrote to the FSA requesting information under the Freedom of Information Act 2000 in these terms:

[This] request for information deals with the affairs of Riverstone Managing Agency Ltd (formerly Kingsmead...) ...On October 1 2003 ... Kingsmead sent a letter to ... FSA’s Insurance Firms Division; and on October 17 2003 a presentation was given by Kingsmead/Riverstone to the FSA. This correspondence related to a scheme to reinsure to close syndicate 271 ... I should be grateful if you would kindly take steps to identify and disclose to me the information held by the FSA relating to this transaction...

By letter dated 18 November 2005 the FSA refused that request in reliance on section 12 (“Exemption where cost of compliance exceeds appropriate limit”) while stating that in any event the information requested was not disclosable by reason of sections 44 (“Prohibitions on disclosure”) and 43 (“Commercial interests”).

7. On 29 November 2005 Mr Holman wrote again stating that he wished to make a further request for information relating to the same managing agent and syndicate and stating:

In addition, syndicate 3500, the reinsurer of syndicate 271, was permitted to accept a total premium of £504.1m despite being capitalised at £5m. This would appear to be in breach of the 'regulatory minimum margin' (of solvency) and, again, I should be grateful if ... you would arrange for me to be provided with full details of any information you hold in relation to this.

The FSA responded on 23 December 2005 confirming they had information of the type requested and providing some information but declining to supply the balance in reliance on sections 40 ("Personal information") as well as 43 and 44.

8. Mr Holman asked for an internal review of those decisions and they were upheld in a letter dated 13 March 2006. Mr Holman then applied to the Information Commissioner under section 50 on 13 May 2006; unfortunately his decision notice was not delivered until 14 April 2008.

The Information Commissioner's decision

9. The Commissioner upheld the FSA's decision to refuse the information requested in the letter of 20 October 2005 on the basis of section 12, accepting that there would be a substantial amount of information held about RMAL, that the request related to a specific transaction and that the cost of locating information relating to that transaction within the information held about RMAL would exceed the "appropriate limit".
10. As for the other request, in the course of the investigation the FSA supplied the Commissioner with the documents which they said fell within the request annotated to show where the particular exemptions were relied on; we shall refer to these documents as the "withheld information". The vast bulk of the withheld information was shown as being exempt under section 44 and the Commissioner upheld the FSA's approach in relation to that section. The Commissioner also upheld the FSA's approach in relation to section 40. As for the information which the FSA claimed they were entitled to withhold under section 43, quite late in the course of the investigation they informed the Commissioner that they also considered that it could be withheld by virtue of section 31 ("Law enforcement"). The Commissioner found that neither section 43 nor section 31 was engaged and that this information

should therefore be disclosed by the FSA. Against that decision the FSA appealed to the Tribunal.

The course of the appeal to the Tribunal

11. Although he made no application Mr Holman was joined as a party to the appeal at the outset. However he did not respond to any communication from the Tribunal and on 9 July 2008 it was ordered that if he wished to remain a party he must apply in writing; this he has never done. RMAL applied to be joined as a party because of their interest in the application of section 43 and they were ordered to be joined. The hearing was set for three days starting 17 November 2008.
12. The Commissioner's skeleton argument for the appeal was served on 24 October 2008. In it he stated that he had reviewed the case in the light of the witness statement of Mr Nicholas Bentley (the managing director of Riverstone's UK operations) submitted on behalf of RMAL and that he now accepted that at the relevant time section 43 was engaged and the public interest in maintaining the section 43 exemption (narrowly) outweighed the public interest in disclosure. This meant in effect that the Commissioner no longer opposed the FSA's appeal and the FSA therefore wrote to the Tribunal on Friday 7 November 2008 inviting it to determine the appeal on the papers without a hearing and to allow the appeal on the basis of the Commissioner's concession on section 43 without considering any issues arising under section 31. Mr Holman was contacted by the Tribunal on 10 November and invited to make any observations or applications arising out of the FSA's letter by midday on 12 November but again he took no action. (We should record that he did send an email to the Tribunal on Sunday 16 November 2008 stating that he was not sure what he could add to the proceedings and would be unable to make himself available on 17 November though he could be available on 18 and 19 November if the Tribunal wished; in the event he appeared in the Tribunal just after lunch on 17 November when the open part of the hearing had been completed and we were just about to go into closed session and was therefore unable to observe or participate.)
13. On 12 November 2008 the Tribunal considered how to proceed in the light of these developments and we decided that we were unwilling to determine the appeal

without the benefit of a hearing and a (shorter than anticipated) hearing without witnesses attending in person was therefore held. We also directed that the documents comprising the withheld information which had been supplied to the Tribunal as part of the material for the appeal should be re-organised so that they were in chronological order. We are grateful to the FSA for carrying out this task which made our own task much easier but we mention the point in the hope that it will not be necessary to give such a direction in future: however many different sources and files information is derived from, public authorities must present it to the Commissioner and the Tribunal in a logical and coherent way (which will usually involve putting documents into chronological order) so that they can review it properly.

The scope of the request

14. On consideration of the withheld information it was apparent to the Tribunal that a large part of it related to matters arising after the re-insurance to close transaction had been completed in November 2003. The Tribunal took the view that the request in Mr Holman's letter dated 29 November 2005 arguably covered only information relating to that transaction itself and not information relating to subsequent events and we raised the point as a preliminary matter. All three parties agreed that it was open to the Tribunal to raise this issue itself and to determine the true scope of the request before considering the question of exemptions and they also agreed that the request could be read in the way the Tribunal was suggesting.
15. Although nobody was able to say for sure exactly what Mr Holman was referring to when he mentioned the premium of £504 million, the capitalization of £5 million and the "regulatory minimum margin" in his request, the Tribunal has come to the clear view, construing the request objectively in the context of the earlier request in the letter of 20 October 2005, the background facts we have outlined and Mr Holman's own position as a member of syndicate 271, that what he was asking for was information relating to the approval of the re-insurance to close transaction. We are therefore satisfied that the request was arguably even narrower than that in the letter of 20 October 2005 but that, in any event, it certainly did not cover information relating to matters subsequent to the re-insurance to close transaction. We would

note that on any view the request was not expressed in the clearest terms and it would have been a good idea (and might have saved a lot of time and effort) if the FSA had taken steps pursuant to section 16 to clarify matters with Mr Holman at an early stage.

16. The effect of our conclusion as to the scope of the request is that a large part of the withheld information was never disclosable under Part I of the Act regardless of the application of any of the exemptions and, in relation to that part of the information, the appeal must therefore necessarily be allowed.

Section 43

17. That conclusion still leaves some information which comes within the terms of the request and which is not covered by section 44 but which the FSA maintain they were entitled to withhold by virtue of section 43. It was accepted on all sides that, although the Commissioner no longer sought to uphold his decision that this information should have been disclosed, there is no procedure for disposing of the appeal by consent and that it had to be determined by the Tribunal on its merits notwithstanding that there was no-one arguing the case (at least in relation to section 43) against the appeal. Nevertheless Mr Flint QC on behalf of the FSA submitted that, in spite of the requirement for the Tribunal to determine the appeal on its merits, it was in some way confined to considering the issues as they had been formulated by the parties and in particular that it must determine whether the information in question came within section 43 and where the public interest lay on a "global basis" without considering the information in detail. We reject that submission: the Tribunal can only allow the appeal and vary the Commissioner's decision notice to the extent that the Commissioner's notice is "not in accordance with the law" (as it is put in section 58(1)(a)); in so far as the information in question can be divided up, the Commissioner was obliged to consider each piece of information and apply section 43 and the public interest test to it and the Tribunal must accordingly adopt the same approach when considering the appeal.

18. The Tribunal has considered the documents comprising the part of the withheld information which comes within the terms of Mr Holman's request in detail and received submissions on them in closed session. For reasons which are set out in

detail in a fuller version of this decision which has been supplied to the parties and Mr Holman and which shall remain confidential, the Tribunal is satisfied that, to adopt the wording of the relevant sections of the Act, disclosure of the information in question would, or would be likely to, prejudice the commercial interests of Riverstone and that the public interest in maintaining the exemption in section 43(2) outweighs the public interest in disclosing the information. We therefore agree with current view of the Commissioner and accordingly also allow the appeal in relation to the information considered in this section of our reasons.

Sections 31 and 17

19. Those conclusions mean that the Tribunal does not need to consider the section 31 points raised by this appeal and we are happy to accede to the invitation of the parties not to do so.
20. There is one point we wish to mention, however, notwithstanding that it did not feature in the appeal and that the Commissioner has not had an opportunity to comment on it. As we mention above it was only during the investigation by the Commissioner that the FSA first sought to rely on section 31. This led the Commissioner in his decision notice to find that the FSA had breached section 17(1)(b) of the Act which requires a public authority to specify any exemption relied on in its refusal notice. That finding cannot, we think, be correct. Section 17 can only require the public authority to specify an exemption relied on at the time of the notice and clearly the FSA were not relying on section 31 at that time. Rather than finding a breach of section 17 the Commissioner ought in these circumstances to have considered whether to allow the FSA to claim reliance on a new exemption for the first time before him. The Tribunal has recently given guidance as to the correct approach to that issue in its decision in *DBERR v Information Commissioner (Friends of the Earth, additional party)* EA/2007/0072 at paras 41-45. The Commissioner cannot of course be criticised for not following that approach since the decision of the Tribunal in that case came after his decision in this case.

Conclusion and remedy

21. For all those reasons, the appeal is allowed and the Commissioner's decisions that the FSA did not comply with the Act and should disclose information to Mr Holman are set aside.

22. We are grateful for the assistance given to the Tribunal and the hard work put in by the parties and their lawyers.

23. Our decision is unanimous.

Murray Shanks
Deputy Chairman

Date: 23 December 2008