

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 19 November 2007

**Public Authority:** Financial Services Authority  
**Address:** 25 the North Colonnade  
Canary Wharf  
London  
E4 5HS

### Summary

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The complainant requested information held by the FSA in relation to an investigation against himself. The FSA found that some of the information was his personal data and dealt with this as a subject access request. The FSA disclosed some information to the complainant under the Act but found that the remaining information was exempt under section 40, 44 and 42. The Commissioner investigated and found that the exemptions were engaged and that the authority was correct to have withheld the information.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. The complainant has advised that on 23 February 2006 he made the following request for information to the Financial Services Authority (FSA):

*"I require full copies of all correspondence and communications (internal and external) held by the FSA appertaining to all claims against me (CIMS) that the FSA have invited and / or received and processed, including all the files relating to these claims that have been passed on to the FSCS or FOS. This information to include all inter-agency communications that relate to the actioning of these claims against me. I wish to retain the option to request further relevant information should it become necessary."*

3. The FSA wrote to the complainant on 23 March 2006 informing the complainant that it held information but that some information may be exempt under section 30, 31 and 42 of the Act. The FSA explained that as the exemptions are qualified exemptions it required more time to consider the public interest test by virtue of section 10 of the Act. The FSA stated it hoped to be in a position to respond fully by 21 April 2006.
4. On 12 May 2006 the FSA provided a substantive response to the complainant's request. The FSA explained that some of the information was being treated as a subject access request under the Data Protection Act and that some of the information was being treated as Freedom of Information Act request for information. The FSA stated that under the Freedom of Information Act it had identified information falling within the scope of the request but that some of this information was exempt under section 40, 44 and 42 of the Act.
5. On 25 of September 2006 the FSA completed an internal review of this decision and communicated the findings to the complainant. The review upheld the original decision to withhold information under sections 40, 44 and 42 of the Act.

## **The Investigation**

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### **Scope of the case**

6. On 9 November 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public interest in disclosure of the information.
7. The complainant also raised other issues, including allegations that the FSA's actions against him were in breach of the FSA's statutory authority and therefore unlawful. These issues are not addressed in this Notice because they are not requirements of Part 1 of the Act

### **Chronology**

8. The Commissioner began his investigation by writing to the FSA on 23 August 2007. The Commissioner asked the FSA to provide him with a copy of the information being withheld under the Act and for further explanation regarding the application of the exemptions.
9. The FSA responded on 5 October 2007 providing further explanation regarding the application of the exemptions and a copy of the information being withheld. The Commissioner wrote to the FSA on 12 October 2007 asking further questions regarding the application of the exemptions with reference to the withheld information.
10. On 26 October 2007 the FSA responded providing answers to all the additional questions raised.

## Findings of fact

11. The FSA has provided the Commissioner with a 67 page bundle of documents some parts of which have been disclosed in full to the complainant, some withheld in their entirety and some withheld in part.
  - Pages 1-3, 7-10 and 35-65: Letters sent from ex-clients of the complainant, disclosed redacted of the clients personal data (name, address and contact details) under section 40.
  - Pages 3-6, 17: Disclosed in full
  - Pages 11-15, 19-24, 27-28, 31-34: Withheld under section 42
  - Pages 16, 18, 26: Disclosed with redactions under section 42.
  - Page 25: Paragraphs one and one sentence in paragraph three withheld under section 44, paragraphs two and four withheld under section 42.
12. The information withheld relates to an investigation by the FSA into the complainant and his firm with regards the possibility of taking regulatory action against him in relation to his liabilities under the pensions review.
13. The personal pensions mis-selling review is aimed at people wrongly sold personal pensions between 29 April 1988 and 30 June 1994. Miss-selling occurred when people who would have been financially better off at retirement in their employer's pension scheme were advised to leave or not to join their employers scheme and took out personal pensions plan instead. A number of cases of mis-selling resulted from advice given by independent financial advisers, many of whom were sole traders, small partnerships or small companies.

## Analysis

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### Exemption: Section 42 'Legal Professional Privilege'

14. Section 42 of the Act provides that information is exempt from disclosure if a claim to legal professional privilege could be maintained in legal proceedings. There are two types of privilege, legal advice privilege and litigation privilege. Legal professional privilege protects confidential communications between professional legal advisers (including an in-house legal adviser) and clients from being disclosed.
15. The FSA explained that pages 11-15 are communications between lawyers within the FSA's enforcement division. The enforcement division is comprised of different departments, each of which focuses on different areas of financial services activity. Most of the departments are made up of multi-disciplinary teams of lawyers and non lawyers who are responsible for investigating suspected misconduct or rule breaches and making recommendations on whether the FSA should take formal action against a company or individuals. One of the lawyers was within a multi-disciplinary team and gave day to day legal advice on issues arising from the complainant's case and the other lawyer was based in the

Enforcement's Law, Policy and International Co-operation Department (LPIC). This department provides advice to case teams (and therefore the FSA itself) in cases which raise complex or difficult legal issues. On 30 August 2002 the first lawyer wrote to the lawyers in LPIC asking for advice regarding the complainant's case (pages 11-14 as referenced in the list of withheld information). On 1 October 2002 the lawyer within LPIC responded (page 15). The FSA considered these communications to be discussions between lawyers for the purposes of seeking and giving legal advice and are therefore legally professionally privileged (LPP).

16. The FSA stated that pages 16 and 18 are emails between lawyers within the FSA acting in their capacities of legal advisors. Legal advice privilege can also apply to communications requesting advice if this reveals the scope of the advice. The information redacted from page 16 indicates the scope of the advice to be provided and the information redacted from page 18 is part of the ongoing process of a lawyer advising how to deal with the complainant's circumstances in relation to unresolved complaints.
17. The FSA explained that pages 19 to 24 consist of an email and draft memo sent by one lawyer to another within the Enforcement department. The memo includes an analysis of the FSA's power to take action in the circumstances described and a recommendation as to the next step. The FSA considered the communications were discussions between lawyers for the purposes of giving legal advice on the use of powers by the FSA and therefore privileged. The notes made on the draft memo were made by one of the lawyers as part of the discussions.
18. On page 25 the second and fourth paragraphs have been withheld under section 42 and are confirmation of instructions for legal advice to a lawyer. The FSA explained the legal professional privilege applies to instructions to lawyers as such disclosure will indicate the nature of the legal advice received from the lawyer. On page 26 one sentence has been redacted under section 42 as it refers to a document drawn up by lawyers as part and parcel of communicating advice and assistance.
19. The FSA explained that pages 29-30 are exempt under section 42 as they are drafts prepared by a lawyer as part of his advice and assistance. Pages 31-34 is an email chain which contains an exchange between a lawyer in the General Counsels Division, a lawyer in the Enforcement department and another lawyer. The content of the emails reveal the scope of the legal advice sought and provided relating to the case.
20. The Commissioner has viewed the information and considered the explanations provided by the FSA. The Commissioner notes that for the information to attract legal professional privilege it must consist of confidential communications made for the purposes of obtaining or providing legal advice. There is no requirement that the legal advice must relate to litigation.
21. The Commissioner is satisfied that the information withheld in response to the complainant's request under section 42 is confidential legal advice obtained by FSA from internal counsel.

22. The Commissioner is therefore satisfied that a claim to legal professional privilege could be maintained so that the exemption at section 42 of the Act is engaged.

### **Public Interest Test**

23. Section 42 is a qualified exemption and is therefore subject to the public interest test. The Commissioner must therefore decide if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information withheld under section 42.
24. The FSA acknowledge that there is a public interest in disclosure of information which could increase public awareness and understanding of the FSA's views, analysis and decisions surrounding Pensions Review, especially for consumers who are owed compensation by regulated firms who couldn't or wouldn't carry out the Pensions Review on its Pensions Business.
25. The FSA state however, that there is a strong public interest in public bodies being able to communicate fully and frankly with legal advisers and vice versa, particularly in cases which are difficult or contentious. In this case the legal advice was about the possibility of taking regulatory action against a firm for failing to conduct a review of pensions business; and the possibility of FCSC (Financial Services Compensation Scheme) declaring the firm 'in default'; and claims arising from customers against the firm.
26. The FSA further argue that if such advice were to be routinely disclosed it would be likely to inhibit the candour and honesty in which the FSA staff are able to communicate with its lawyers. This would compromise the effective decision making of FSA staff to the detriment of the public interest. The FSA's ability to obtain and consider prompt and adequate legal advice would be undermined.
27. The complainant states that there is a strong public interest in ensuring that the FSA have acted within their powers and not acted inappropriately in 'persecuting' him.
28. The Commissioner recognises that there are strong public interest arguments for disclosing the information as disclosure would allow the public to understand the basis for FSA's decision making and outline any legal justification it has for certain decisions. However, The Commissioner is mindful that there is a strong element of public interest inherent in legal professional privilege which must be taken into account when considering the application of section 42. The Commissioner notes the tribunal case of *'Bellamy vs. the Information Commissioner and the DTI'* in which the Tribunal concluded that:

*"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest... it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut cases"*

29. The Commissioner has considered the arguments put forward by the FSA and considers these reasons demonstrate a strong argument for maintaining the exemption. These reinforce the strong public interest inherent in the notion of legal professional privilege. Whilst the Commissioner is mindful of the strong public interest in greater public understanding of how the FSA reaches decisions, there is a risk that disclosing confidential legal advice could undermine the FSA's ability to obtain this advice in a timely fashion and have confidence that the advice given is done so freely without the consideration of its wider disclosure.
30. For these reasons, the Commissioner has concluded that the public interest in maintaining the section 42 exemption outweighs the public interest in disclosure. Accordingly, the information requested covered by section 42 is exempt from disclosure.

#### **Section 44 'Prohibitions on disclosure'**

31. Section 44 provides that information is exempt if its disclosure by the public authority is prohibited under any enactment. Section 44 has been applied to one paragraph and one sentence within the bundle of documents.
32. Section 348 of the Financial Services and Markets Act (FSMA) provides that confidential information must not be disclosed by the FSA without consent. In order to establish if the information is covered by the statutory bar the Commissioner must consider the following questions, these question relate to the wording of the bar: is the information confidential under the terms of the FSMA; has consent been given; has the information already been disclosed to the public and could the information be provided in the form of an anonymised summary.
33. The Commissioner first considered whether, for the purposes of section 348 of the FSMA, the information is confidential information. Confidential information as defined by section 348 must have been obtained by the FSA as part of its functions as the regulatory body overseeing the financial services industry and be information which relates to the business or other affairs of any person. The legal definition of 'person' includes corporations and limited companies.
34. The FSA explained that the information withheld under section 44 is a communication between an investigator within the FSA's enforcement division and another FSA colleague. The first paragraph notes information received from the Financial Services Compensation Scheme (FSCS). As the FSCS is a separate body from the FSA, information received about the FSCS' intentions is information about its 'business or other affairs' and so is confidential information. The sentence withheld in paragraphs 3 of page 25 also states the FSCS' position in relation to the case and it is therefore information received from the FSCS. The investigation into the complainant was done so under one of the FSA's functions as the regulatory body overseeing the financial services industry.
35. The Commissioner is therefore satisfied that the information in question was confidential information obtained by the FSA for the purpose of discharging its functions as the regulator of the financial services industry.



36. Section 348 (1) states that confidential information must not be disclosed without the consent of the person from whom the information was obtained from or if different to whom the information relates. The FSA explained that it has not consulted the FSCS to ask for their consent to disclose the information as it was not required to do so under section 348. Section 348 does not require consent to be sought but where it has not been given that the FSA consider the likelihood that it would be, it is clear from the nature of the information requested that consent from the FSCS would not be given. The Commissioner notes that the complainant has indicated that he has obtained consent from his son (who now owns the business) to disclose information to the complainant. However, the information withheld under section 44 was obtained from the FSCS and whilst it relates to the complainant and his son, for consent to be applicable it must be from the person the information was obtained from.
37. Section 348 (4) recognises that information is not confidential if it has already been disclosed to the public or is in the form of a summary or collection of information framed so that it is not possible to ascertain information relating to a particular person. The information requested has not already been disclosed to the public and the information is about a specific firm and it would therefore not be possible to provide the information in any form which would not enable the person to be identified.
38. Section 349 of the FSMA states that section 348 does not prevent disclosure of confidential information which is made for the purpose of the carrying out of a public function and permitted by regulations made by the Treasury under this section. In the recent Information Tribunal decision EA/2005/0019 '*Slann vs. Financial Services Authority*' the tribunal found that the term public functions related to powers conferred on the FSA by legislation and not legislation such as FOIA, to which it was subject. Therefore making a disclosure under FOI was not carrying out a public function.
39. The Commissioner therefore finds that the information is covered by section 348 of the FSMA and that section 44 of the Act is engaged where applied. Section 44 is an absolute exemption and there is no requirement to consider the public interest test.

#### **Section 40 'Personal Data'**

40. Section 40 provides that information is exempt if the information is the personal data of someone other than the applicant, 'third party data', and disclosure of the information would breach any of the data protection principles. The term 'personal data' includes information about a living individual from which that individual can be identified.
41. In order for the Commissioner to reach a decision as to whether section 40 has been applied correctly the Commissioner must first consider if the information is personal data and then decide if disclosure would breach any of the data protection principles.
42. The information withheld under section 40 is the names, addresses and contact details of ex-clients of the complainant whose complaints were considered by the

Pensions Review. These details are contained within letters sent from the ex-clients to the complainant, from the ex-clients to the regulators and from the regulators to the clients. The body of the letters have been disclosed to the complainant with the above details redacted. Having viewed the information withheld the Commissioner is satisfied that the information is personal data.

43. The Commissioner must therefore decide if disclosure of the information would breach any of the data protection principles. The first data protection principle requires that personal data be processed fairly and lawfully. When considering compliance with the First Data Protection Principle it is necessary to consider, among other things, what the legitimate expectations of the data subject would be with regard to disclosure and whether disclosure would cause them unnecessary or unwarranted distress.
44. The FSA explained that in deciding if disclosure was fair to the individuals it took into account a number of factors. In favour of disclosure was the fact that the complainant may contact the individuals to discuss compensation, however against disclosure the FSA concluded that it was more likely that the complainant might contact the individuals with a view to refuting their statements that they were mis-sold pensions and the subsequent decision by the FSCS and the Financial Ombudsman Service (FOS) that they were due compensation. The FSA also felt that if the complainant did wish to discuss compensation he has the option of liaising with the FOS to resolve these claims.
45. The FSA explained that it had to consider that disclosure of information under the Act was disclosure to the public and not just to the complainant and whilst the complainant may already have access to some of these clients details they were not known to the wide public. The FSA went onto explain that the individuals had not been guaranteed that their details would be kept anonymous but that they would not have expected their details to be made publicly available under the Act, as they would have expected the regulators to treat it in confidence.
46. The Commissioner has viewed the information and whilst he acknowledges that some of this information is already in the possession of the complainant, he agrees that the individuals would not have expected that their personal data would be made publicly available under the Act.
47. The Commissioner therefore accepts that, in the circumstances of this case, to release this kind of personal data about these individuals would contravene the fairness element of the first data protection principle.
48. The Commissioner therefore finds that section 40 is engaged and as section 40(2) in this situation is an absolute exemption there is no need to consider the public interest test.



## The Decision

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49. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## Steps Required

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50. The Commissioner requires no steps to be taken.

## Other Matters

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51. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of Subject Access. Therefore, the Commissioner has also made an assessment under section 42 of the DPA as to whether some of the information in question in this case should be disclosed to the complainant under this access right. However, this assessment has been dealt with separately and will not form part of this Decision Notice, as the Commissioner does not believe it would be appropriate to record an assessment under section 42 of the DPA within a Decision Notice under section 50 of the Act

## Right of Appeal

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52. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 19<sup>th</sup> day of November 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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