

Freedom of Information Act 2000 (Section 50)

Decision Notice

11 August 2008

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

Summary

On 7 March 2005 the complainant requested a copy of information from the Financial Services Authority (FSA) regarding his investment in Fiox Limited. This information would originally have been held by the FSA's predecessor, Investment Management Regulatory Organisation (IMRO). The FSA refused the request, applying the exemptions under sections 43(2) and 44, and subsequently sections 40(2), 21 and 31(1) (g). After investigation, the Commissioner considers that the FSA correctly applied the exemptions under sections 21, 40(2) and 44. In relation to sections 31(1) (g) and 43(2), the Commissioner has decided that the FSA was incorrect to apply these exemptions and orders the FSA to disclose to the complainant any information requested which was withheld on the basis of them. Finally the Commissioner finds that the FSA was in breach of section 17 of the Act in failing to state in its refusal notice and on internal review all the exemptions it subsequently applied.

The Commissioner's Role

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

The Request

2. On 7 March 2005 the complainant made the following request for information to the Financial Services Authority (the "FSA"):

"It is under the terms of the Freedom of Information Act that I am asking to see a copy of IMRO's files that refer to my investment in Fiox Limited. This was managed by Oakland Investment Management Limited".

3. The FSA responded on 8 April 2005 that it held information which was the subject of the request but that it needed further time to consider the public interest test in respect of the exemption under section 43 of the Act. The FSA did not give the complainant any estimation of how long this would take.
4. On 18 May 2005 the FSA issued a refusal notice to the complainant. It disclosed some information to him, but withheld other information on the basis of sections 43 and 44 of the Act. The FSA explained that it considered section 43 applied because disclosure of some of the information would or would be likely to prejudice the commercial interests of any person. It had considered the public interest test in relation to the exemption and had concluded that the public interest lay against disclosure for three reasons:
 - it was in the public interest for the FSA to have open and candid exchanges of information and views with regulated firms, which should remain confidential
 - disclosure of the requested information might inhibit future settlement agreements being reached between the FSA and regulated firms, and hence might harm the FSA's role as an effective regulator
 - disclosure might harm the commercial interests of firms, for example by leading to changes in share price and an adverse effect on consumer confidence.

It stated that section 44 (an absolute exemption) applied to some information since disclosure of that information was prohibited by section 348 of the Financial Services and Markets Act 2000 (the "FSMA"); disclosure of confidential information in breach of section 348 was a criminal offence. Although some of the information was received by the FSA or its predecessor organisations before the FSMA came into force, the FSA explained that the operation of section 348 had been made retrospective under Part V of the FSMA (Disclosure of Confidential Information) Regulations 2001 which were made under section 349 of the FSMA.

5. The complainant replied to the FSA on 31 May 2005 that he disagreed with its decision, since he argued that information relating to Oakland Investment Management Limited ("Oakland") was now too old for damage to be caused to any commercial interests and in any event the company had changed in several ways.
6. The FSA clarified its refusal to the complainant in its letter dated 10 June 2005. In relation to section 43, it stated that it had consulted Oakland for its views. It also stated that it should also have applied the exemption contained in section 40(2) (a) of the Act to some of the information, in addition to the exemptions already applied. The FSA considered that this was personal data which it would be unfair to disclose under the First Data Protection Principle contained in the Data Protection Act 1998 (the "DPA").

7. There was further correspondence between the parties in June 2005 and on 18 July 2005 the complainant requested the FSA to undertake an internal review. He asked in particular that the FSA consider points he made, as follows. In relation to the section 43 exemption, he argued that there would be no damage to commercial interests and in relation to section 44 that the information he sought was not “confidential”.
8. The FSA’s letter dated 24 August 2005 set out the result of its internal review, in which it upheld its original decision as well as its subsequent application of the personal data exemption in section 40(2)(a). It also stated that it was good practice to obtain the views of Oakland in relation to section 43, and that although the FSA had consulted Oakland for its views, it had reached its own objective opinion based on that consultation.
9. The complainant wrote to the FSA on 13 December 2005 to query why the FSA applied sections 40 and 43, in view of its application of section 44. He wondered also why the FSA considered information it had received to be confidential. In a further letter dated 16 December 2005, the complainant argued against the application of sections 40 and 43. In particular, in relation to section 43 he suggested that there were no commercial interests to prejudice.
10. On 6 January 2006 the FSA replied to the complainant’s points and provided a further explanation of its reasoning in relation to sections 40, 43 and 44.
11. Relevant legislation is stated in the Legal Annex at the end of this Notice.

The Investigation

Scope of the case

12. On 10 February 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 following points:
 - The FSA’s decision under sections 40, 43 and 44.
 - The FSA’s reference to a Decision Notice issued by the Commissioner on 26 September 2005.
13. The FSA also raised section 31 in its letter to the Commissioner dated 24 August 2007 and the Commissioner has therefore also considered the application of this exemption.
14. The Commissioner notes that the FSA’s stated grounds for refusing the complainant’s request have evolved over time. The refusal grounds were adjusted between the original refusal and again on internal review, as well as in the FSA’s response to the Commissioner. The Commissioner also notes that no single exemption has been applied to the information as a whole but that the exemptions have all been applied to specific paragraphs and pages within the

withheld information. It has therefore been necessary for the Commissioner to consider the application of all the exemptions.

15. In his original complaint and in subsequent correspondence with the Commissioner, the complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

16. The complainant made a complaint to the Commissioner under the Act on 10 February 2006. The Commissioner replied on 17 February 2006, seeking copies of relevant documents. The complainant provided these on 20 February 2006.
17. Investigation of the complaint by the Commissioner commenced in June 2007, when the Commissioner wrote both to the complainant and the FSA to request copies of further documents. The missing items were provided to the Commissioner by the end of June 2007.
18. On 11 July 2007 the Commissioner wrote to the FSA to seek a copy of all the information within the scope of the request. The Commissioner, having considered the responses provided by the FSA to the complainant, also asked the FSA to explain and clarify its responses and in particular to explain its application of the exemptions under sections 40, 43 and 44 of the Act.
19. Following a telephone conversation in the meantime, the FSA responded in writing to the Commissioner on 24 August 2007, enclosing a copy of the information requested. That letter also expanded on the FSA's application of exemptions under the Act. In addition the FSA clarified that, in its response to the complainant, it had confined itself to the complainant's specific request for information, dated 7 March 2005 and quoted at paragraph 2 above.
20. In September 2007 the Commissioner and the FSA corresponded in order to clarify the identity of the information withheld. On 4 September 2007 the FSA wrote to the Commissioner explaining that section 21 'information accessible to the applicant by other means' also applied to some of the withheld information. The Commissioner wrote a detailed letter to the complainant, copied to the FSA, setting out his preliminary findings. In that letter the Commissioner explained to the complainant that the FSA would now copy to him much of the information which had previously been withheld. The Commissioner asked the complainant to indicate whether or not he would like to receive a copy of material recently identified as being subject to section 21.
21. The FSA wrote to the complainant on 9 October 2007 providing him with a copy of the additional information highlighted in the Commissioner's letter which had previously been withheld under sections 31, 40 and 43.
22. The complainant wrote to the ICO on 10 October 2007 stating that he would "be happy to accept from FSA whatever additional information has been identified as a result of your work". At this point, the complainant had not yet received the copy documentation from the FSA. He then went on to express concerns about points

which are outside the scope of the Commissioner's role under the Act. The Commissioner wrote to the complainant on 22 October 2007 to explain the limitations of his statutory role.

23. The FSA, the Commissioner and the complainant also corresponded in October 2007 to clarify some of the documents disclosed.
24. On 17 November 2007 the complainant wrote to the Commissioner to indicate his dissatisfaction with the FSA. He expressed the view that a number of points remained to be resolved in relation to his original complaint to the FSA - a complaint which had been made outside the Act.

Findings of fact

25. The complainant suggested in the letter dated 16 December 2005 that Oakland did not have commercial interests to prejudice since it did not "trade", and hence the exemption in section 43 could not apply. The Commissioner however accepts that Oakland does have commercial interests which have the potential to be harmed.
26. The Commissioner also accepts as a fact that the FSA acquired the functions and responsibilities of its predecessor IMRO and hence that information received by IMRO is to be treated as having been received by the FSA.
27. The Commissioner also finds as a fact that following his intervention in this case, the FSA reviewed its previous decisions and disclosed a significant amount of information which it had previously withheld. This information comprised that which was formerly withheld under sections 31, 40 and 43 of the Act, as outlined in the Commissioner's letter to the complainant dated 25 September 2007. The Commissioner also finds as a fact that the FSA disclosed to the complainant some information which it had previously withheld under section 21 of the Act.

Analysis

Procedural Matters

28. Section 17(1) states that a public authority which is relying on a claim that the information is exempt, must, within the time for complying issue a refusal notice which:
 - (a) states the fact that information is exempt,
 - (b) specifies the exemption in question, and
 - (c) states why the exemption applies.
29. The FSA refined its view on two occasions, adding in the exemptions in sections 21, 31 and 40. On 10 June 2005, subsequent to its refusal notice, the FSA applied the personal data exemption in section 40 to some of the information. It upheld this view on internal review. In its response to the Commissioner dated 24

August 2007, the FSA also applied section 31 and on 4 September 2007 the FSA explained some information was exempt under section 21.

30. The Commissioner will consider what, if any, procedural breaches have occurred at the time of completion of the internal review. At the time of the internal review the FSA had explained to the complainant that the information was being withheld under section 40, 43 and 44. However during the course of the investigation the FSA also sought to rely on section 21 and 31. The Commissioner therefore finds that the FSA breached section 17(1) (b).

Section 31(1) (g)

31. Section 31(1) (g) states that information is exempt if its disclosure would or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2). The FSA states the purposes applicable in subsection (2) are those at: (a) the purpose of ascertaining whether any person has failed to comply with the law; (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper; (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise and (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become authorised to carry on.
32. The FSA applied this exemption for the first time in its letter to the Commissioner dated 24 August 2007. The Commissioner has considered whether section 31 is engaged. Section 31(1)(g) applies to information the disclosure of which would, or would be likely to prejudice the exercise of any of the functions set out in section 31 (2)(a) to (d). The Commissioner is satisfied the FSA has functions listed in section 31(2) since it has regulatory and investigatory powers in relation to firms as described in that section.
33. However section 31 is a 'prejudice based' exemption and to engage the exemption the Commissioner must consider if disclosure of the information would, or would be likely to prejudice the functions listed in 31(2) (a), (b) (c) and (d). The Commissioner has applied to this case the definition of prejudice as discussed in the Information Tribunal decision EA/2005/005 *John Connor Press Associates v The Information Commissioner*, where the Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk". This view was further expanded in the Tribunal decisions *Hogan v the Information Commissioner EA/2005/0026* and in *England v the Information Commissioner and the London Borough of Bexley* where the Tribunal considered when a prejudice based exemption might apply, and indicated that there must be a causal relationship between the potential disclosure and the prejudice, whilst acknowledging the need to extrapolate this from the available evidence.
34. The FSA argued that disclosure would prejudice its ability to have open and candid exchanges with regulated firms as any such exchanges should remain confidential. It explained that disclosure would discourage firms from entering into

full and frank dialogue with it and this could lead to a reduction in co-operation with the FSA which would harm the efficiency and effectiveness of the FSA as a regulator. Finally the FSA argued that disclosure of the information which was not exempt by section 44 could lead to the obtaining of an incomplete picture and potentially to incorrect conclusions.

35. The Commissioner recognises the FSA's concerns about the potential impact of disclosure of sensitive information upon its regulatory and investigatory role, particularly at an earlier stage, during the course of an investigation or immediately afterwards. However by the time the request for information was made, some years after the investigation, the position had altered. His analysis is that the information to which the FSA applied section 31 is no longer sensitive due to the passage of time, and indeed it had ceased to be so by March 2005 when the request was made. Moreover, whilst the FSA has argued that disclosure could result in a reduction in co-operation by firms with the FSA, resulting in harm to the FSA's regulatory functions, the Commissioner does not consider that the FSA has demonstrated a "real and significant risk" of prejudice. He notes in particular that the FSA has powers under the FSMA to compel firms to co-operate with it and provide it with information.
36. The Commissioner also notes that the information withheld under section 31 has also been withheld under section 43.
37. The Commissioner finds that section 31 is not engaged as he does not find that disclosure would, or would be likely to prejudice the functions listed in sections 31(2) (a), (b), (c) and (d). It is not therefore necessary to go onto consider the public interest test.

Section 43(2)

38. The FSA had withheld some information under section 43 of the Act in its initial refusal notice to the complainant. It also maintained that view in subsequent correspondence. It stated that it had weighed up the balance of the public interests for and against disclosure and concluded that on balance the public interest lay against disclosure.
39. In its internal review letter, in response to points made by the complainant, the FSA also explained other reasons why it considered that section 43 applied. Despite the information being "now ten years old", it considered at the time of refusal that disclosure could still prejudice commercial interests. The FSA explained that it had consulted the management of Oakland Investment Management Limited for its views. Those views were that "release of the information would prejudice the firm's commercial interests as the information related to unproved suspicions about them". The FSA had emphasized to the complainant, and re-emphasized to the Commissioner, that it took those views into account with all the other circumstances when reaching its own decision to withhold the information under section 43.
40. However in its letter dated 24 August 2007 to the Commissioner, the FSA stated that it had now revised its view. It had done this "in light of recent guidance and

decisions from the ICO and the Tribunal, and also through “our own experience of applying exemptions since the request was made in March 2005”. Hence the FSA now considered that “the majority of the information which was previously withheld under s43..... could now be disclosed to the requester, as we do not think that disclosing the information publicly would, or would be likely to, harm the commercial interests of Oakland”. It stated that the reasons for this were that the information was now over ten years old (the Commissioner notes that this was a point previously made by the complainant) and the fact that IMRO’s investigation did not result in any regulatory action against Oakland.

41. In its letter of 24 August 2007, the FSA however continued to apply section 43 to a small amount of information and in addition applied section 31 to that information. It still considered that the commercial interests of Oakland were likely to be harmed by disclosure, including “unfair or unjustified adverse comment and speculation... (which) could affect the firm’s brand and reputation ... The value of the firm’s shares could fall and their ability to secure new funding for their business could also be affected”.
42. The FSA had disclosed to the Commissioner a small amount of information to which it considered s43 applied alone (i.e. without s44). In telephone discussions with the Commissioner, the FSA agreed that it would disclose the remainder of the information which it had previously withheld solely under section 43, as mentioned above.
43. The Commissioner has considered whether the exemption is engaged. Section 43(2) provides that information is exempt if disclosure would, or would be likely to prejudice the commercial interests of any person, including the public authority holding it. The complainant had argued that Oakland has no commercial interests which could be damaged. The Commissioner has considered the position regarding prejudice to interests as he did with regard to section 31, above. He has determined that disclosure would or would be likely to damage those commercial interests; in particular those of shareholders. He accepts that there is a likelihood of such prejudice even where a company is not actively trading. He therefore considers that the exemption in section 43(2) is engaged.

Public Interest Test

44. As section 43 is a qualified exemption he has then gone on to assess the public interest arguments for and against disclosure. The FSA acknowledged that disclosure would enhance public understanding and awareness of the regulatory relationship and would also provide the public with information which might assist the public in making decisions about firms; it set out the following arguments against disclosure:
 - the ability of the FSA to have open and candid exchanges with regulated firms, and that any such exchanges (especially involving commercially sensitive information) should remain confidential
 - disclosure would be likely to discourage firms from entering into full and frank dialogue with the FSA

- this could lead to a reduction in co-operation with the FSA which would harm the efficiency and effectiveness of the FSA as a regulator
 - disclosure of the information which was not exempted by section 44 could lead to the obtaining of an incomplete picture and potentially to incorrect conclusions.
45. The Commissioner accepts that it is in the FSA's best interests to have open and candid exchanges with regulated firms, however he does not accept that disclosure would discourage firms from entering into full and frank disclosure with the FSA and therefore have the negative effects discussed above. Further, as noted above, the Commissioner notes that the FSA has powers under the FSMA to require authorised firms to co-operate with the FSA.
46. The FSA have also argued that disclosure could result in inaccurate information being disclosed. The Commissioner does not accept that 'misinterpretation' of the information is a valid reason for withholding information, the FSA would be free to provide context to the information if it were disclosed or an explanation to the public to explain why the information may appear one sided.
47. The Commissioner also notes that it is also in the public interest that as much information as possible about regulated firms is available to consumers to enable them to make informed decisions about their dealings with such firms. He also considers that disclosure of the information withheld under section 43, would assist the public understanding of the role of the FSA and encourage firms to remedy problems quickly in the interests of its customers.
48. The Commissioner has also considered that the information is over ten years old and he finds that on balance, owing to the uncontroversial nature of that information and after such a long passage of time, the information should now be disclosed.
49. The Commissioner finds that the public interest in maintaining the exemption is outweighed by the public interest in disclosure of the requested information.

Section 40(2)

50. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would contravene any of the data protection principles contained in the Data Protection Act 1998 (DPA).
51. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal information as:

...data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

52. The FSA had not applied section 40(2) (a) in its initial refusal notice, but added it in its letter dated 10 June 2005 to the complainant. The FSA stated that some of the requested information comprised personal data which, under the DPA, it would be unfair to disclose. In its response to the Commissioner, the FSA maintained this view, arguing that although the names of some individuals would be known to the complainant, it would be unfair to disclose their names particularly in view of the expectation of confidentiality created by "the confidentiality regime set up under IMRO's rules and then s348 of the FSMA". The complainant had disputed this view, arguing that the personal data would have been provided in a professional capacity. The FSA expressed the view that this was not relevant.
53. During the course of the investigation some of the information withheld under section 40 was disclosed to the complainant, however the FSA have continued to withhold the names of individuals within the documents. The Commissioner accepts that the names of the FSA officers and the Oakland Directors within the documents do constitute their personal data.
54. The Commissioner notes that the FSA argue that disclosure of the names would be in breach of the first data protection principle as it would be unfair. The first data protection principle has three components:
1. Personal data shall be processed fairly
 2. Personal data shall be processed lawfully and
 3. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
55. In considering whether disclosure of the individuals names would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
- The individuals reasonable expectations of what would happen to their personal data;
 - The seniority of the individuals;
 - Whether the individuals specifically refused to consent to the disclosure of the requested information;
 - Whether disclosure would cause any unnecessary or unjustified damage to the individuals; and
 - The legitimate interests of the public in knowing the names of the individuals.
56. As discussed above the FSA states that although some of the individuals may be known to the complainant it would not be fair to disclose their names to the 'wider world' under the Act. The FSA also pointed out that the individuals would have had a reasonable expectation that their names would not be disclosed in the context of the information held. In particular they have pointed out the

confidentiality regime set up under the IMRO's rules and the confidentiality arrangements of section 348 of the FSMA.

57. On the basis of the above, the Commissioner accepts that individuals would have had an expectation that their names, in the context of this information, would not be placed in the public domain. However, simply because an individual has an expectation that information held about them will not be disclosed, this does not necessarily mean that this expectation is a reasonable one. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules its states that:

'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'

58. On the basis of this guidance the Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed under the Act.
59. This approach is supported by the Information Tribunal decision (*House of Commons v Information Commissioner and Norman Baker MP* EA2006/0015 and 0016). This decision involved a request for information about the details of the travel allowances claimed by MPs. In its decision the Tribunal noted that:

'where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives'. (Tribunal at paragraph 78).

60. The Commissioner also believes that a distinction can be drawn between the levels of information which junior staff should expect to have disclosed about them compared to what information senior staff should expect to have disclosed about them. This is because the more senior a member of staff is the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds.
61. The Commissioner notes that the names withheld relate to both junior members of staff and directors holding a more senior position. The Commissioner also notes that the directors names are publicly known. However the FSA argue that simply because the directors names are publicly known does not meant that their association with a particular investigations is or that everything they say or do becomes publicly known. The FSA also pointed out that the names of directors at Oakland are not public sector employees.

62. The Commissioner accepts that section 40 is engaged as disclosure of the individuals names would breach the first data protection principle. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle there is no need to consider if the processing of the personal data would meet one of the conditions of Schedule 2.

Section 44(1)

63. In its response to the Commissioner, the FSA reiterated its view that the absolute exemption in section 44 applied to some of the requested information, on the basis of section 348 of the FSMA which prohibits disclosure of any “confidential information” it had received for the purposes of, or in the discharge of its functions. It explained that any information the FSA or its predecessors had received from external parties (including Oakland) in relation to the matter raised by the complainant in his request fell within s348. It would be a criminal offence to disclose that information, except in certain limited circumstances which did not apply in this case.
64. Section 44 provides that information is exempt if its disclosure by the public authority is prohibited under any enactment. The FSA state that the relevant statute prohibiting disclosure of the information is section 348 of the Financial Services and Markets Act (FSMA).
65. Section 348 of the 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 questions 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.
66. First he considered the provision of section 348(1) which states that “Confidential information must not be disclosed... without...consent...” The FSA has stated that it had sought the consent of Oakland to disclose, but that consent was refused.
67. The Commissioner has also assessed whether the information satisfies the definition of “confidential information” within section 348 of the FSMA. 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.
68. The FSA explained that some of the information requested was received by the FSA or its predecessor prior to the FSMA coming into force. However, the operation of section 348 is made retrospective by virtue of Part V of the FSMA (disclosure of Confidential Information) Regulations 2001 (SI 2001 No 2188) which were made under section 349 FSMA. This means that section 348 applies

equally to information received by the FSA's predecessor organisations, including IMRO.

69. The FSA state that the information was obtained from Oakland or from external parties to the FSA or its predecessor organisations for the purpose of carrying out its investigation into the matter raised by the complainant, i.e. how Oakland had managed his investment in Fiox. It is the Commissioner's view that the information does relate "to the business or other affairs of any person" and that it was received by the FSA or its predecessors for the purposes of, or in the discharge of any functions.
70. 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.
72. 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 Information Tribunal decision EA/2005/0019 '*Slann v 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.
73. 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.

The Decision

74. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

The FSA was correct in applying the exemptions in sections, 40(2) and 44(1) to the information requested

75. The Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The FSA was incorrect to apply sections 31(1) (g) and 43(2) of the Act to the information requested

- As the information withheld under sections 31(1) (g) and 43(2) should have been disclosed to the complainant the FSA breached the requirements of section 1(1) (b).
- The FSA erred in procedural terms, failing to observe the requirements of section 17(1) (b).

Steps Required

76. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose to the complainant the remaining information it had previously withheld under sections 31(1) (g) and 43(2).

77. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

78. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

79. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 11th day of August 2008

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

The Freedom of Information Act 2000

Section 17

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

Section 21

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

Section 31

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

....

- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),....
- (2) The purposes referred to in subsection (1)(g) to (i) are –
- (a) the purpose of ascertaining whether any person has failed to comply with the law,
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
 - (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,...

Section 40

(1) Any information to which a request for information relates is exempt information if it constitutes personal; data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if –

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

Section 43

(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)...

Section 44

- (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...

The Financial Services and Markets Act 2000

Section 348

- (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).