

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 March 2010

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

Summary

The complainant submitted four requests to the Financial Services Authority (FSA) all of which focussed on the involvement of Aberdeen Asset Management Ltd in split capital investments, and the FSA's subsequent investigation into such investments. The FSA complied with the first request but refused the remaining requests on the basis that the aggregated cost of complying with them was estimated to exceed the appropriate cost limit of £450. The Commissioner has considered the circumstances of this refusal and has concluded that the requests are sufficiently 'similar' to entitle the FSA to aggregate the cost of complying with them. Furthermore, the Commissioner is satisfied that the FSA has provided a reasonable estimate which demonstrates that the cost of complying with any one of these three requests would exceed £450 and thus the FSA is entitled to refuse to fulfil any of the three remaining requests. The Commissioner is also satisfied that the FSA fulfilled its obligation under section 16 of the Act to provide advice and assistance.

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.

Background

2. In 2004 the FSA conducted an investigation into the activities of certain fund managers and brokers operating within the split capital investment trust sector between September 2000 and February 2002. Aberdeen Asset Management Ltd (AAML) was one of 22 such operators. The FSA reached agreement with the firms to resolve the investigation and published its report on 24 December 2004; this report can be viewed on the FSA website at: <http://www.fsa.gov.uk/Pages/Library/Communication/PR/2004/114.shtml>

The Request

3. The complainant submitted the following request to the FSA on 9 November 2007:

"I am requesting information under the Freedom of Information Act in relation to Split Capital Investment Trusts and more specifically Ordinary Income Shares.

- 1) Please provide information as to the Regulatory requirements placed on Aberdeen Asset Managers Ltd (AAML) in relation to their promoting and selling financial products to Clients during the period January 2001 to June 2001. Please include the actual Regulatory requirements including wording, in relation to the accuracy and composition of marketing documentation and the requirement to ensure that a client was made fully aware of risk.
- 2) Please provide information, including FSA reports and memos, to indicate whether AAML were fully aware of problems affecting Split Capital Investment Trusts in early 2001 and if there was either a direct or indirect requirement placed upon them to follow the guidance detailed in the PIA Regulatory Update 85.
- 3) Please provide information on whether the FSA has considered the contents of the Aberdeen Monthly High Income Plan brochure (the version sent out by AAML in April 2001) during its investigation into Split Capital Investment Trusts. If the contents of the document was considered, then please provide the FSA's findings on whether the risk/reward claims made in document in relation to those investment trusts being promoted were considered to be appropriate (in April 2001) and fairly represented the performance of those Trusts featured and the known risk at the time.

In relation to FSA publication FSA/PN/114/2004, there is a section in the document dealing with areas where the financial services industry must learn lessons and where one of the identified issues is as follows:

Material promoting investment products must properly disclose the specific and significant risks relevant to the product and/or the market at the time it is being promoted. Where the risk characteristics have changed markedly over time it is the responsibility of firms to reflect these changes in promoting the product.

4) Please provide information as to why the FSA identified the above issue in the document and whether information held by the FSA (findings in reports etc) show a connection between the above statement and documentation issued by AAML."

(The above numbers were added to the request by the FSA and have been used here for ease of reference.)

4. The FSA acknowledged the receipt of the request on 14 November 2007 and replied in full on 7 December 2007 explaining that it felt that the information requested in paragraph 1) was available by other means and refused to comply with this request, relying on section 21 of the Act.
5. With regard to the information requested in paragraphs 2), 3) and 4) although some of the information requested was provided, the FSA explained it could not provide all of the information requested within the appropriate cost limit of £450, which equated to 18 hours of work. The FSA therefore explained that it was relying on section 12 of the Act as the basis upon which to refuse these requests. The FSA explained that even if these requests could be answered within the cost limit it was likely that some of the information would be deemed as exempt under section 40 (personal information) and section 44 (prohibitions on disclosure).
6. On 17 December 2007 the complainant asked the FSA to undertake an internal review of its handling of the request.
7. The FSA wrote to the complainant on 11 January 2008 and explained that it had undertaken an initial internal review. The information originally withheld under section 21 was now released by the FSA.
8. The FSA concluded that the requests in paragraphs 2), 3) and 4), originally refused under section 12 of the Act, should continue to be refused under section 12. The FSA advised the complainant that it would be able to respond to the request if it was refined in line with

two other requests being considered by the FSA. The FSA suggested the following:

"FSA Board minutes and accompanying papers submitted to the Board in relation to the Split Capital Investment Trust investigation."

9. The complainant wrote to the FSA on 16 January 2008 asking it to complete the internal review of her original request.
10. The FSA wrote to the complainant with the results of its completed review on 21 January 2008, confirming the use of section 12 of the Act for the requests numbered 2), 3) and 4). In order to support this decision the FSA provided the complainant with a description of the steps it would need to undertake in order to locate and extract the relevant information and why such a process, in the FSA's opinion, would greatly exceed the cost limit.

The Investigation

Scope of the case

11. On 5 February 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the FSA's application of section 12 of the Act to the requests numbered 2), 3) and 4) above.

Chronology

12. Due to a backlog of complaints about public authorities' compliance with the Act, the Commissioner was not able to begin his investigation of this complaint immediately. Therefore it was not until 1 July 2009 that the Commissioner wrote to the FSA in relation to this complaint. The Commissioner asked the FSA to provide further details to support its decision to refuse the request of 9 November 2007 on the basis of section 12. In particular the Commissioner asked the FSA to explain why the information it collated to enable it to make a statement to the Treasury Select Committee and to publish the document FSA/PN/114/2004 was not sufficient to fulfil the request. The Commissioner also asked the FSA to clarify whether it had sought to aggregate the cost of the requests 3) and 4) contained within the

complainant's letter of 9 November 2007 on the basis of section 12(4) of the Act.¹

13. The FSA provided the Commissioner with a substantive response on 24 August 2009. The FSA confirmed that it did aggregate the estimated cost of answering the requests on the basis that they were on a similar theme, namely AAML. Consequently, the FSA noted that if it estimated that answering one of the requests exceeded the appropriate limit then it was not obliged to respond to the other request. The FSA stated that this was indeed the case as it had estimated that the cost of answering either request would exceed the appropriate cost limit.

Analysis

Substantive Procedural Matters

Section 12 – the cost of compliance exceeds appropriate limit

14. The Commissioner has set out below what section 12 of the Act provides for; then set out the basis upon which the FSA has argued that it can rely on section 12 to refuse the request submitted on 9 November 2007; and then set out why he has concluded that the FSA was correct to rely on section 12.
15. Section 12(1) of the Act provides that public authorities do not have to comply with a request where the estimated costs of responding to that request exceeds the appropriate limit as specified by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations').
16. Section 4(3) of the Regulations sets out the basis upon which an estimate can be made:

“(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only the costs it reasonably expects to incur in relation to the request in –

 - (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and

¹ Section 12(4) allows a public authority to aggregate the estimated cost of complying with two or more similar requests if they were submitted by the same person within 60 working days and are on a similar topic.

(d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per hour."

17. Furthermore section 12(4) of the Act provides that where a public authority receives two or more requests of a similar nature from the same individual or different persons acting in concert, then the estimated cost of complying with any of the requests is taken to be the estimated cost of complying with all of them. Regulation 5 confirms that requests which a public authority chooses to aggregate must 'relate, to any extent, to the same or similar information' and be received by the public authority within any sixty consecutive working day period.
18. The Commissioner is conscious of the comments made by the Information Tribunal in its decision in *Fitzsimmons v Information Commissioner and DCMS* (EA/2007/0124) and the implications they have for this case. In this decision the Tribunal confirmed that the test for aggregating requests as set in Regulation 5 of the Regulations is very wide; requests only need to relate to any extent to the same or similar information in order to be aggregated. The Commissioner takes the view that requests will be 'similar' where there is an overarching theme or common thread running between them in terms of the nature of the information that has been requested.
19. Furthermore, and again to follow the approach taken by the Tribunal in *Fitzsimmons*, in cases such as this where the complainant has submitted one piece of correspondence which includes more than one request, in the Commissioner's opinion technically speaking, multiple requests within a single item of correspondence are separate requests for the purpose of section 12. Therefore, the complainant's letter 9 November 2007 contains four separate requests as opposed to one request with four separate limbs.

The FSA's position

20. In correspondence with the complainant the FSA provided a detailed explanation of the steps it would need to undertake to fulfil her requests numbered (2, (3 and (4 above and an estimate of the time it would take to undertake these activities.
21. The FSA advised the complainant that the material held in paper form in relation to the request is contained within at least 600 boxes

- containing information relating to the Split Capital Investment Trusts investigation. Each box contains on average 4 files each, thus approximately 2,400 files in total. The information requested relating to AAML is spread across all these files, and would therefore need to be located amongst a large amount of information concerning a number of other firms. The FSA estimated that it would take on average 30 minutes to review and edit each file to locate and extract relevant information, this would equate to a total of 1,200 hours. In addition the FSA advised that it holds many thousands of "files" stored electronically which might contain relevant information. Taking these factors into account the FSA is satisfied that it would greatly exceed the £450 limit to comply with this particular request.
22. In response to the Commissioner's enquiries the FSA provided the following information and points in order to clarify and further support its position that section 12 provided a basis upon which to refuse to fulfil the requests 2), 3) and 4).
 23. The FSA confirmed that it did aggregate three of the four requests contained within the complainant's letter dated 9 November 2007 because it considered them to be on a similar theme in that they all requested similar information concerning AAML. Therefore the FSA's position was that if the estimated cost of fulfilling one of the requests exceeded £450 it was not obliged to respond to either of the other two requests.
 24. With regard to the first of the four requests, this concerned information concerning the regulatory requirements in relation to promoting and selling financial products during a specified period of time. This request was fulfilled when the FSA provided copies of the rules to the complainant during the course of the internal review in January 2008.
 25. The complainant made reference to the following "statement" by the FSA to the Treasury Select Committee: "we consider that Aberdeen's promotion material and statements, in particular, were recklessly misleading". The FSA contend that it has been unable to locate any public record of that statement being made by the FSA. However, the quote was made by the Treasury Select Committee (TSC) itself.²
 26. During the TCS's proceedings the FSA provided oral as well as written evidence to the TSC. Its investigation was very extensive and stretched over several years and a large number of FSA staff, as well as external advisors who worked on it. The outcome of the investigation was that the firms agreed a package of approximately £194m to be distributed as compensation to investors. In the course of the investigation substantial material was generated spreading over 600 boxes of hard

² Para 37 of the TCS's Third Report of Sessions 2002-2003

copy material, in addition to the substantial amount of electronic information.

27. The underlying information on which the FSA based its statements to the TSC and on which the press release is based, is contained within the 600 boxes and the electronic material. However, there is no concise pack or source of information to which the FSA can refer as forming the basis of its statements to the TSC and/or the press release, and the precise origin of any particular statement would be difficult to identify. The information on which the FSA's comments as a whole were based is spread across the entirety of the boxes and the electronic folders held.
28. The FSA further contends that the information held in the 600 boxes and the electronic folders covers much more than just the information on AAML. Although some of the evidence presented to the TSC concerned AAML it did not go into specific detail about AAML; this is also the case about the press release. The investigation involved 22 different operators, of which AAML was merely one. Given the nature of the investigation, the enquiries into each firm were not carried out in isolation and information relevant to AAML may be held in connection with information relating to another firm, and vice versa. The FSA therefore claim that it would need to look through all the material held to ensure the information relating to AAML was located.
29. The Commissioner asked the FSA to provide a further breakdown of the potential costs involved in the four activities set out at section 4(3) of the Regulations.
30. The FSA responded by stating that the activities at (a) to (c) above could all be done simultaneously but to do this it would have to manually go through the information contained within the 600 boxes, each containing approximately 4 files each. The FSA estimated that it would take on average 30 minutes to examine each of the 2,400 files. This act in itself would take the estimated costs far in excess of the required £450 limit to comply with a request.
31. The Commissioner asked the FSA if any of the information held within its stored boxes was catalogued or indexed in any way or whether it was held in electronic format.
32. The FSA accepted that there was a limited amount of indexing, in that it holds a spreadsheet listing approximately 670 boxes containing information that is possibly relevant to the request, each containing a number of paper files. For the majority of boxes this spreadsheet only shows which firm the files in the box relate to, each file is number coded. For the remainder of the boxes there is simply a reference to

the type of information held within the boxes, for example external correspondence, interview bundles, disclosure schedules etc.

33. The FSA also conceded that it holds a significant amount of potentially relevant information which is stored electronically. This information is in addition to the information contained within the boxes, although there will be an element of duplication. Much of the electronically held information will have been generated internally whereas the majority of the information in the boxes will have been obtained from the firms under investigation. In either case there could be information within the scope of this particular request held throughout the paper and electronic records.

The Commissioner's position

34. In the light of the Tribunal's comments in Fitzsimmons quoted above at paragraph 18 above, the Commissioner is satisfied that the FSA can aggregate the cost of complying with the requests numbered 2), 3) and 4), made in the letter dated 9 November 2007. This is because in the Commissioner's opinion the requests focus on the FSA's regulation of AAML and thus the requests can correctly be said to be on the same or similar theme.
35. Therefore the Commissioner accepts that the FSA can rely on section 12(4) as the basis to refuse to respond to all the outstanding requests. Simply if the cost of complying with any one of the requests 2), 3) or 4) exceeds the appropriate cost limit.
36. In considering estimates relied upon by public authorities in relation to section 12, the Commissioner has followed the approach of the Tribunal in *Alasdair Roberts v Information Commissioner* (EA/2008/0050) at paragraphs 9 to 13 in which the Tribunal confirmed that the approach of deciding whether an estimate was reasonable involved consideration of a number of issues, including:
- A public authority has only to provide an estimate rather than a precise calculation;
 - The costs estimate must be reasonable and only based on those activities described in Regulation 4(3);
 - Time spent considering exemptions or redactions cannot be taken into account;
 - Estimates cannot take into account the costs of relating to data validation or communication;
 - The determination of a reasonable estimate can only be considered on a case-by-case basis; and
 - Any estimate should be 'sensible, realistic and support cogent evidence'.

37. The Commissioner accepts that the relevant information needed to fulfil the requests 2), 3) and 4) is held in approximately 2400 files held in approximately 600 boxes. The FSA contend that it would take approximately 30 minutes to examine and extract the relevant information. This is perhaps a generous amount of time but even if this could be done in half the estimated time then the time required would still be far in advance of the time required to exceed the appropriate cost limit.
38. The Commissioner accepts that to find all the required information the FSA would have to undertake a manual search of all the files and all of the electronic information held. The FSA have provided a logical explanation of how the manual search would be undertaken and the Commissioner is persuaded that the sheer volume of information would necessitate a search taking far in excess of the required 18 hours to take the costs above the required limit.
39. The Commissioner is aware that the FSA has not provided a detailed explanation of how long an electronic search would take to obtain part of the information held in an electronic format. However, the Commissioner accepts that an electronic search alone would not retrieve all of the information that falls within the scope of the request and that to search for all of the requested information would greatly exceed the £450 limit.
40. On the basis of the above the Commissioner accepts that the FSA provided estimates that are sensible, realistic, supported by cogent evidence and moreover support the conclusion that the cost of fulfilling the requests 2), 3) and 4) would significantly exceed the £450 limit.
41. In reaching this conclusion, and in particular in considering the nature of the searches which the FSA explained it would need to undertake in order to fulfil these requests, the Commissioner has taken into account the argument advanced by the complainant that the FSA must hold the information requested in an easily retrievable format given the work undertaken by the FSA in preparation for its evidence to the TSC and to create its press release.
42. The Commissioner accepts that the investigation carried out by the FSA into the Split Capital Investment Trusts was wide ranging and involved a number of companies of which AAML was one. The Commissioner has not been presented with any evidence to suggest that the involvement of AAML was in any way more significant than the other parties and therefore it is reasonable to believe that the information concerning AAML is in no way more readily identifiable and retrievable than information concerning any other firm involved.

43. The Commissioner is therefore satisfied that although the FSA clearly reviewed and collated significant amounts of information as part of its investigation that included reference to the involvement of AAML, this does not mean that information was collated in a format which would allow the request to be answered using a more efficient methodology than that described above.

Procedural Requirements

Section 16 – duty to provide advice and assistance

44. Section 16 of the Act requires a public authority to provide advice and assistance so far as it is reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information.
45. The section 45 Code of Practice provides guidance to public authorities in carrying out their duties in relation to the Act and includes suggestions in relation to the nature of the advice and assistance that public authorities should provide in relation to section 16 of the Act. In relation to cases where the public authority has refused a request on the basis of section 12, the guidance suggests that:
46. ‘...the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee³ (Para 14).
47. The Commissioner is satisfied that in the circumstances of this case, the FSA provided the complainant with a reasonable level of advice and assistance in order to allow the request to be refined. The Commissioner has reached this conclusion by considering the actions of the FSA when it suggested the request could be refined in line with two other requests being considered by the FSA asking for: ‘FSA board minutes and accompanying papers submitted to the Board in relation to the Split Capital Investment Trust Ltd’.
48. However, the Commissioner does feel that it would have been helpful if the FSA had explained to the complainant that some of the information is held in an electronic form and the search for that information alone could have been presented as an option to refine the request, although it is accepted that this would not represent the entirety of the information held by the FSA.

³ Freedom of Information Act, Section 45 Code of Practice:

The Decision

49. The Commissioner's decision is that the public authority was entitled to refuse to disclose requests 2, 3 and 4 by virtue of the application of section 12(1) of the Act.

Steps Required

50. The Commissioner requires no steps to be taken.

Right of Appeal

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

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

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 8th day of March 2010

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

Section 12(2) provides that –

"Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit."

Section 12(3) provides that –

"In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases."

Section 12(4) provides that –

"The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

Duty to provide Advice and Assistance

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

The appropriate limit

3. - (1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act.

(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.

(3) In the case of any other public authority, the appropriate limit is £450.

Estimating the cost of complying with a request - general

4. - (1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request-

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act^[3], and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.

Estimating the cost of complying with a request - aggregation of related requests

5. - (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority -

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which-

- (a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and
- (b) those requests are received by the public authority within any period of sixty consecutive working days.

(3) In this regulation, "working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971^[4] in any part of the United Kingdom.