

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 June 2010

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

Summary

The complainant requested information from the Financial Services Authority (FSA) about instructions and suggestions it had sent to HFC Bank about an agreed remedial action plan. The FSA disclosed a limited amount of information but withheld the rest on the basis of exemptions in sections 31 and 44 of the Freedom of Information Act (the Act). In response to a request for internal review of its decision, the FSA upheld its original decision to withhold information as exempt under sections 31 and 44 of the Act. The Information Commissioner has investigated the complaint and has decided the FSA was entitled to rely on the exemption at section 44 to withhold some of the requested information but that it was not entitled to rely on the exemption at section 31 to withhold the rest of the information, which should be disclosed to the complainant.

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 29th May 2008 the complainant requested information in the following terms from the FSA:

In the FSA press release issued on 16 January 2008, the FSA said

"Following discussions with the FSA, HFC has agreed to implement changes to its sales processes and has agreed to a robust remedial action plan, overseen by third party accountants, involving a programme of customer contact and, if appropriate, steps to ensure that its customers are not disadvantaged."

- *Please can you confirm whether the FSA instructed or suggested HFC to include any particular steps (including a request or suggestion to include particular wording in any communications to its customers) in the above mentioned agreed remedial action plan.*
 - *Please provide a list of the dates on which the FSA (i) met with HFC; or (ii) spoke to HFC to provide such instructions or suggestions.*
 - *Please provide a copy of all written communications sent by the FSA to HFC that included any such instructions or suggestions.*
 - *If any such instructions or suggestions were provided by the FSA to HFC orally, please provide a copy of:*
 - *Any minutes of the meetings (appropriately redacted) in which such instructions or suggestions were provided.*
 - *Any FSA internal documents that set out the instructions and/or suggestions to be provided to HFC.*
 - *Any FSA internal documents that set out the instructions and/or suggestions that were provided to HFC.*
 - *To the extent that such documents are not provided in response to the above requests, please provide a copy of any FSA internal documents that describe the FSA's general policy position as regards the steps that companies who have been the subject of enforcement action are expected to take (i) by way of a remedial action (including any steps to ensure that its customers are not disadvantaged); and (ii) in terms of a programme of customer contract (contact?) including any specific information that a company should provide to its customers).*
3. On 27 June 2008, the FSA responded, confirming it held the information requested in so far as it related to discussions between the FSA and HFC Bank regarding the agreed remedial action plan. The FSA confirmed it had held meetings with HFC Bank to discuss the action plan and provided the dates of those meetings as well as dates on which the FSA had spoken with the HFC Bank.
4. The FSA refused to provide the remainder of the requested information, relying on the exemption at section 44 of the Act and stated the exemptions at sections 31 and 42 of the Act may also apply. With regard to sections 31 and 42, the FSA's letter noted that these

exemptions were qualified and it was currently weighing the balance of the public interest with regard to these two exemptions. The FSA wrote again on 18 July 2008 having considered the matter further. It was satisfied the exemption at section 42 did not apply but the exemption at section 31 did and public interest was against disclosure.

5. The complainant requested an internal review of this decision in a letter dated 1 August 2008 and the FSA provided the outcome of the review in a letter dated 30 September 2008. The review concluded the original decision concerning sections 31 and 44 should be upheld. In addition, the review concluded further information should be provided in response to the last bullet point of the information request, which asked about the FSA's general policy regarding the steps companies who have been the subject of enforcement action are required to take.

The Investigation

Scope of the case

6. In a letter dated 13 October 2008, 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:
 - concern the FSA was not fully complying with its obligations under the Act because of its extremely broad interpretation of statutory exemptions and the public interest test
 - most of the FSA's regulatory functions are discharged through bi-lateral negotiations with regulated firms so the FSA's fear that any disclosure under the Act may negatively impact upon firms' willingness to engage freely in such negotiations in future would mean that in practice very little is ever disclosed
 - concern information requests were not considered on their merits and instead a standard approach was adopted
 - concern that the request for internal review had not been considered on its merits as no reference was made in the FSA's response to many of the points raised by Which?

Chronology

7. The Commissioner wrote to the complainant on 15 October 2008 and to the FSA on 1 November 2008 to acknowledge receipt of the complaint. On 23 June 2009, the Commissioner wrote to both the complainant and the FSA to set out his initial analysis of the complaint and to note issues raised by the complaint may be affected by a

forthcoming High Court judgement in the case of the FSA v the Information Commissioner [2009] EWHC 1548 (Admin).

8. On 24 August 2009, the Commissioner wrote to the complainant to explain the ramifications of the judgement had been considered and he would now be writing to the FSA to ask for further information. The Commissioner wrote to the FSA the following day and asked for a copy of the withheld information as well as asking a number of further questions. The FSA replied on 8 October 2009.
9. Having examined the FSA's response, the Commissioner asked a number of supplementary questions on 27 November 2009. The FSA replied on 4 December 2009. On 12 March 2010, the Commissioner contacted the complainant to provide an update on the progress of the investigation and on 18 March 2010 contacted the complainant again to provide an initial assessment of the possible outcome of the investigation. On 19 March 2010 the complainant confirmed he wished his complaint to proceed to a formal decision.
10. As noted at paragraph 8 above, the FSA provided the Commissioner with copies of the withheld information on 8 October 2009. The withheld information consisted of meeting notes, telephone notes, emails, letters and attachments. The FSA had annotated the information to show where it had applied the exemptions in sections 31 and 44 respectively. Other sections were marked "NR" where the FSA considered the information was not within scope of the information request.

Analysis

Exemptions

Section 44

11. Section 44(1)(a) provides information is exempt if its disclosure is prohibited by or under any enactment. The relevant enactment for this complaint is the Financial Services and Markets Act 2000 (FSMA). Section 348 of FSMA sets out the restrictions on disclosure of confidential information received by the FSA. It must not be disclosed by a primary recipient (for present purposes the FSA) without the consent of the person from whom the primary recipient obtained the information and if different the person to whom the information relates. Section 348 also defines confidential information for the purposes of this part of FSMA. Confidential information is information

that relates to the business or other affairs of any person, was received by the primary recipient (in this case the FSA) for the purposes of or in the discharge of any of the FSA's functions and is information that has not been made available to the public.

12. Section 349 of FSMA sets out the exceptions from section 348. Confidential information can be disclosed if the disclosure is made for the purpose of carrying out a public function and is permitted by regulations made by the Treasury under this section of FSMA. The full texts of sections 348 and 349 of FSMA as well as an extract from the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 are in the Legal Annex to this Notice.
13. The Commissioner is satisfied that the information requested in the present case relates to the business or other affairs of any person as required under section 348 of FSMA. The request was carefully phrased to include the instructions or suggestions sent *from* the FSA *to* the HFC Bank. This would tend to exclude from the scope of the request information that had not been "received" by the FSA as required under FSMA and by extension would militate against reliance on the exemption at section 44 of the Act with reference to FSMA. However the FSA argued the position was not clear cut.
14. In refusing to disclose information because it considered the information to be exempt under section 44 with reference to FSMA, the FSA noted it contained "embedded" "received" information. The FSA described this as "information which on the face of it appears to have been generated by the FSA, such as a comment, opinion or question, but which on analysis in fact also includes received information".
15. The FSA illustrated its point with two example questions. The FSA stated the question "have you contacted all policyholders?" did not include any "received information". However the FSA used a second example question "why have you only contacted policy holders who bought single premium policies, but not those who bought regular premium policies?" to illustrate how "received" information could be embedded and combined with the instructions or suggestions it made to regulated firms as part of its regulatory and enforcement functions. The second question used information the FSA had "received" already about the types of policyholder it had contacted.
16. The Commissioner has considered the arguments advanced by the FSA to explain its reliance on the exemption at section 44 of the Act. The Commissioner agrees in a negotiation involving discussion backwards and forwards between the FSA and the HFC Bank it will often not be immediately clear what the exact origin of information is and

- consequently whether it has been “received” by the FSA as required under FSMA.
17. On the question of whether the information was “received”, the Commissioner has examined the annotated withheld information provided by the FSA and is satisfied those sections marked “section 44” do contain confidential information “received” by FSA as required under FSMA. In some cases this consideration is straightforward. For example, any telephone note that records information received from HFC Bank by the FSA as part of the negotiations will have been “received” by the FSA. It might be argued such information is outside the scope of a request specifically seeking information about instructions or suggestions the FSA sent *to* the HFC Bank. However, as noted above, it is in the nature of a negotiation for instructions or suggestions from one party, the FSA, to be commented on by the other party, the HFC Bank. For this reason, the Commissioner is satisfied that whilst the letters from the HFC Bank to the FSA are not within the scope of the request, some of the information in them will have been referred to in letters from the FSA to the HFC Bank and this information clearly falls within the scope of the request. The Commissioner is also satisfied the FSA was correct to treat such information as “received” for the purposes of or in the discharge of any of the FSA’s functions.
 18. In addition, the Commissioner is satisfied that in the present case the FSA was also entitled to regard the less clear cut information that contained “embedded” information as “received” and therefore to rely on the exemption at section 44 with reference to FSMA. The Commissioner notes the information concerned is sufficiently close to information originally received from the HFC Bank. This was an issue in the case of *Slann v the Information Commissioner and FSA* (EA/2005/0019), where the Tribunal found that the request was for information that, although not directly equivalent to the information received by the FSA, had it been released “it would have been possible to effect a trail leading back to the confidential information”.
 19. In reaching this conclusion the Commissioner is distinguishing between complete documents held by the FSA and pieces of information contained within those documents and has decided those pieces of information originated from the HFC Bank and were sent to and hence were “received” by the FSA. Having examined the wording of section 348 of FSMA, the Commissioner notes it applies a deliberately wide definition of what constitutes “confidential information” that may not be disclosed. The definition in section 348 of FSMA does not apply any restriction to when the information was “received” or whether it has been processed once already by the FSA

and is being used for the second time (e.g. to inform the wording of a question being posed as part of the FSA's enforcement function).

20. Section 348 of FSMA makes clear "confidential information" can be disclosed with the consent of the person from whom the primary recipient obtained the information or if different the person to whom the information relates. In the present case the "person" is the HFC Bank. In its letter of 8 October to the Commissioner the FSA stated the HFC Bank had been asked but declined to give the necessary consent to disclose the information requested.
21. Section 348(4) of FSMA states information is not confidential if it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by section 348 of FSMA. As the FSA issued both a Final Notice against the HFC Bank and a press notice covering its actions the Commissioner has considered whether the information within scope of the request that the FSA has withheld as exempt under section 44 of the Act has in fact already been made available to the public.
22. Having reviewed the press notice and the Final Notice (see: <http://www.fsa.gov.uk/pages/Library/Communication/PR/2008/004.shtml>) the Commissioner notes they contain a high level of detail about the HFC Bank's original breach and the FSA's subsequent enforcement action. The press notice states a programme of customer contact would take place and also refers to negotiations between the FSA and the HFC Bank, which resulted in a 30% discount in the fine payable under the FSA's executive settlement procedures. However, neither notice contains details of "instructions or suggestions" made by the FSA concerning the agreed remedial action plan, which form the basis of this information request. Therefore the Commissioner is not satisfied the requested information has been made available to the public under section 348(4) of FSMA.
23. For all of these reasons the Commissioner is satisfied the FSA was entitled to rely on section 44 of the Act, with reference to FSMA, to withhold as exempt the information so marked.

Section 31

24. In response to the Commissioner's enquiries the FSA clarified that for the rest of the withheld information it was relying on the exemption in section 31(1)(g) for the purpose of sub-section (2)(c) of the Act. Section 31(1)(g) provides 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

purpose referred to in 31(2)(c) is that of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

25. The Commissioner accepts that, as the regulator for financial services in the United Kingdom with statutory rule-making, investigatory and enforcement powers under FSMA, the FSA has regulatory powers with a clear basis in law that fall within section 31(2)(c) of the Act.
26. To engage the section 31 exemption it is necessary for the FSA to demonstrate that disclosure of the information would, or would be likely to, cause some relevant prejudice. The Commissioner's interpretation of "likely to prejudice" is that there should be evidence of a significant risk of prejudice to the subject of the exemption. The degree of risk must be such that there "may very well" be prejudice to those interests. Whether prejudice exists is to be decided on a case by case basis. The prejudice test is a dynamic concept and different levels of prejudice will occur at different times according to the varying circumstances in which the relevant regulatory activities are being considered.
27. In the present case, the FSA argued it is in the public interest for it to conduct open and candid exchanges of information with the firms it regulates. The FSA's firm view is that disclosing confidential information that falls outside section 348 of FSMA about its settlement discussions with a regulated firm would harm its ability to conduct disciplinary proceedings efficiently and effectively in future. Firms would be reluctant to engage in informal or off the record discussions if there was the likelihood that the substance of those discussions would be made public at a later date. The FSA noted that regulated firms' expectation of confidentiality is supported by the "without prejudice" doctrine, which it stated "protects the contents of settlement discussions in litigation generally".
28. The FSA argued that if disclosure of such information took place, the likely outcome would be that regulated firms would no longer take part in informal discussions with a view to settling cases quickly and informally. The consequence would be that "the FSA would have to pursue all or materially more disciplinary proceedings through the full formal process". This would have an impact on the FSA's resources and introduce the element of uncertainty, including for affected customers, inherent in any litigation process.
29. By contrast to this formal route, in the present case, the FSA was able to engage quickly in detailed negotiations with the HFC Bank "regarding the actions required to satisfactorily remedy the issues

- identified". By agreeing to undertake remedial action at an early stage and waiving its right to refer the matter to the Financial Services and Markets Tribunal, the HFC Bank qualified for a 30% discount on the financial penalty imposed on them by the FSA.
30. Therefore the prejudice identified by the FSA is that if information of the type requested, which has been withheld under section 31, was disclosed then regulated firms would be reluctant to engage in informal discussions with a view to quick settlement of cases, including early payment of compensation to customers, where appropriate.
31. The Commissioner has considered the FSA's arguments but is not satisfied they demonstrate the prejudice claimed would be likely to occur. The Commissioner has reached this conclusion for a number of reasons. The first is that although the FSA is relying on the exemption in section 31(2)(c) of the Act, with reference to section 31(1)(g), the Commissioner notes nothing suggests the FSA's regulatory action against the HFC Bank is anything but complete. Section 31(2)(c) provides for an exemption for "the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise". In the Commissioner's view, the wording of section 31(2)(c) would have required the FSA to be considering actively whether there are or may be in the future circumstances to justify regulatory action against the HFC Bank at the time the information request was made, but the FSA has not suggested this was the case. In fact, both the FSA Press Notice and Final Notice had been issued before the information request was made.
32. In addition, the Commissioner has considered FSA's wider argument that regulated firms would be unwilling to engage in early, informal discussions with a view to quick settlement of cases. A similar argument was considered by the Information Tribunal in the case of the Financial Services Authority v the Information Commissioner (EA/2008/0061). In that case, the Tribunal was not satisfied the disclosure of the disputed information would create a real and significant risk of decreasing the amount of information voluntarily provided to the FSA by firms about themselves and therefore found the functions at 31(2)(c) and (d) would not be prejudiced. The Tribunal placed cumulative weight on the following factors (paragraph 24):
- *Incentives that encourage engagement*
The Tribunal noted the incentives on firms to supply information about themselves and generally co-operate with the FSA, namely, Principle 11 of the FSA's Principles for Business. It also considered firms would have a desire to mitigate any steps taken against them and avoid formal enforcement action, noting that these

would have remained in place even if disclosure of the disputed information led them to believe that FSA's views on such information might possibly be disclosed.

- *Existing risk of publication*
In addition, to this, for firms regulated by FSA, there was always a risk that information submitted by firms about themselves voluntarily, and the FSA's view on such information would ultimately come to be published pursuant to s391(4) of FSMA.
 - *Level of engagement post FOIA*
There was no evidence that firms' behaviour had changed to being less open since the introduction of the Act.
33. In addition to these factors, the Commissioner notes that the FSA's argument ignores the very powerful incentive of a 30% discount on fines that is available to the FSA to persuade firms to settle quickly. In addition, the Information Tribunal noted in the case referred to in the previous paragraph that section 348 of FSMA provides a statutory bar on the disclosure of confidential information the FSA "receives" from firms during the course of any such informal negotiations. Regulated firms can be reassured confidential information provided to the FSA and which is "received" by the FSA during the course of informal negotiations will be protected from disclosure by section 348 of FSMA.
34. For all these reasons the Commissioner is not satisfied the FSA has demonstrated the requested information it withheld as exempt under section 31 of the Act is exempt or that its disclosure would be likely to prejudice the exercise of the FSA's functions.

Section 36

35. In its letter to the Commissioner dated 8 October 2009, the FSA stated "it now seems clear to us that, if section 31 were not to apply to the relevant information, a Qualified Person would reasonably conclude that public disclosure would 'otherwise prejudice the effective conduct of [the FSA's] public affairs' for the purposes of section 36, on the basis of the reasoning set out above and in our section 17 letters."
36. For the FSA, all individual Board Members can act as a Qualified Person for the purposes of section 36 of the Act. Although there is no requirement in the Act for the Qualified Person to sign a certificate or to give an opinion in writing the FSA has not provided any evidence of any kind to demonstrate that any FSA Board Member has either been asked or has given his or her opinion on the present case. As the wording of the FSA's letter quoted in the previous paragraph makes

clear this possibility was simply floated as an alternative in the event it was decided section 31 did not apply to the withheld information. Nothing has been provided to support any claim that a reasonable opinion of a qualified person has been given in this case.

37. Where a public authority has not referred to a particular exemption when refusing a request for information, the Commissioner may exercise his discretion and decide whether, in the circumstances of the case, it is appropriate to take the exemption or exception into account if it is raised in the course of his investigation. The Commissioner is under no positive duty to consider exemptions that have not been referred to by a public authority but may do so if it seems appropriate to him in any particular case. For the reasons given, the Commissioner can see no reasonable justification for accepting the late claim to exemption under section 36 in the circumstances of the case.

Procedural Requirements

Section 1: General Right of Access

38. The Commissioner has considered whether the FSA has complied with section 1 of the Act in respect of this request. 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."

39. The complainant requested the information on 29 May 2008 and the FSA confirmed that it held the information on 27 June 2008 and therefore complied with section 1(1)(a) with respect to the requested information. However the FSA has not provided the complainant with the information that is not exempt as set out at paragraph 34 above and therefore it has breached section 1(1)(b).

Section 10: Time for compliance

40. The Commissioner has considered whether the FSA has complied with section 10(1), which provides that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

41. The complainant made his request on 29 May 2008 and the FSA has not yet provided the requested information and therefore it has breached section 10(1).

The Decision

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

- withheld part of the requested information as exempt under section 44 of the Act with reference to section 348 of FSMA.

43. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- by failing to disclose the rest of the requested information that was not disclosed because it was treated as exempt under section 31 the FSA has breached section 1(1)(b) and section 10(1) of the Act.

Steps Required

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

- disclose the information it has withheld as exempt under section 31 of the Act.

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

Failure to comply

46. 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

47. 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 sent.

Dated the 30th day of June 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

Freedom of Information Act

1 General right of access to information held by public authorities

(1) 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.

31 Law enforcement

(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—

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the [1976 c. 14.] Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(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,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

44 Prohibitions on disclosure

- (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,
 - (b) is incompatible with any Community obligation, or
 - (c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

Financial Services and Markets Act 2000

Disclosure of information

348 Restrictions on disclosure of confidential information by Authority etc

- (1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of—
- (a) the person from whom the primary recipient obtained the information; and
 - (b) if different, the person to whom it relates.

- (2) In this Part “confidential information” means information which—
- (a) relates to the business or other affairs of any person;
 - (b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority, the competent authority for the purposes of Part VI or the Secretary of State under any provision made by or under this Act; and
 - (c) is not prevented from being confidential information by subsection (4).
- (3) It is immaterial for the purposes of subsection (2) whether or not the information was received—
- (a) by virtue of a requirement to provide it imposed by or under this Act;
 - (b) for other purposes as well as purposes mentioned in that subsection.
- (4) Information is not confidential information if—
- (a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or
 - (b) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.
- (5) Each of the following is a primary recipient for the purposes of this Part—
- (a) the Authority;
 - (b) any person exercising functions conferred by Part VI on the competent authority;
 - (c) the Secretary of State;
 - (d) a person appointed to make a report under section 166;
 - (e) any person who is or has been employed by a person mentioned in paragraphs (a) to (c);
 - (f) any auditor or expert instructed by a person mentioned in those paragraphs.
- (6) In subsection (5)(f) “expert” includes—
- (a) a competent person appointed by the competent authority under section 97;
 - (b) a competent person appointed by the Authority or the Secretary of State to conduct an investigation under Part XI;
 - (c) any body or person appointed under paragraph 6 of Schedule 1 to perform a function on behalf of the Authority.

349 Exceptions from section 348

- (1) Section 348 does not prevent a disclosure of confidential information which is—
- (a) made for the purpose of facilitating the carrying out of a public function; and

- (b) permitted by regulations made by the Treasury under this section.
- (2) The regulations may, in particular, make provision permitting the disclosure of confidential information or of confidential information of a prescribed kind—
- (a) by prescribed recipients, or recipients of a prescribed description, to any person for the purpose of enabling or assisting the recipient to discharge prescribed public functions;
 - (b) by prescribed recipients, or recipients of a prescribed description, to prescribed persons, or persons of prescribed descriptions, for the purpose of enabling or assisting those persons to discharge prescribed public functions;
 - (c) by the Authority to the Treasury or the Secretary of State for any purpose;
 - (d) by any recipient if the disclosure is with a view to or in connection with prescribed proceedings.
- (3) The regulations may also include provision—
- (a) making any permission to disclose confidential information subject to conditions (which may relate to the obtaining of consents or any other matter);
 - (b) restricting the uses to which confidential information disclosed under the regulations may be put.
- (4) In relation to confidential information, each of the following is a “recipient”—
- (a) a primary recipient;
 - (b) a person obtaining the information directly or indirectly from a primary recipient.
- (5) “Public functions” includes—
- (a) functions conferred by or in accordance with any provision contained in any enactment or subordinate legislation;
 - (b) functions conferred by or in accordance with any provision contained in the Community Treaties or any Community instrument;
 - (c) similar functions conferred on persons by or under provisions having effect as part of the law of a country or territory outside the United Kingdom;
 - (d) functions exercisable in relation to prescribed disciplinary proceedings.
- (6) “Enactment” includes—
- (a) an Act of the Scottish Parliament;
 - (b) Northern Ireland legislation.

(7) "Subordinate legislation" has the meaning given in the [1978 c. 30.] Interpretation Act 1978 and also includes an instrument made under an Act of the Scottish Parliament or under Northern Ireland legislation.

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (DISCLOSURE OF CONFIDENTIAL INFORMATION) REGULATIONS 2001

DISCLOSURE OF CONFIDENTIAL INFORMATION GENERALLY

Disclosure by and to the Authority, the Secretary of State and the Treasury etc.

3. - (1) A disclosure of confidential information is permitted when it is made to any person -

(a) by the Authority or an Authority worker for the purpose of enabling or assisting the person making the disclosure to discharge any public functions of the Authority or (if different) of the Authority worker;

(b) by the Secretary of State or a Secretary of State worker for the purpose of enabling or assisting the person making the disclosure to discharge any public functions of the Secretary of State or (if different) of the Secretary of State worker;

(c) by the Treasury for the purpose of enabling or assisting the Treasury to discharge any of their public functions.

(2) A disclosure of confidential information is permitted when it is made by any primary recipient, or person obtaining the information directly or indirectly from a primary recipient, to the Authority, the Secretary of State or the Treasury for the purpose of enabling or assisting the Authority, the Secretary of State or the Treasury (as the case may be) to discharge any of its, his or their public functions.

(3) Paragraphs (1) and (2) do not permit disclosure in contravention of any of the directive restrictions.