

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 July 2011

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

Summary

The complainant made a freedom of information request to the Financial Services Authority ("the public authority") to request copies of three reports it had produced in relation to Split Capital Investment Trusts. The public authority refused the request by relying on the exemptions; section 21 (Information accessible by other means); section 40 (Personal information), section 43 (Commercial interests) and section 44 (Prohibitions on disclosure). The Commissioner has considered the complaint and has found that all of the requested information is exempt from disclosure under section 44 of the Act by virtue of the statutory prohibition in section 348 of the Financial Services and Markets Act 2000. The Commissioner requires no steps to be taken.

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 6 August 2010 the complainant made a freedom of information request to the public authority for copies of 3 documents relating to the public authority's investigation into the Split Capital Investment Trust

sector and Aberdeen Asset managers Ltd which he had been made aware of as a result of an earlier request he had made to the public authority. The request read as follows:

"With reference to a previous FOI request to the FSA (reference FOI805), it was stated on Page 2 in a letter of 14th March 2008 from the FSA that 'In the course of this exercise, we have identified further documents which whilst not constituting 'Board Minutes' or 'accompanying papers' in relation to the FSA's investigation into the Split Capital Investment Trust Sector, are nonetheless documents which we feel are relevant to your request and ought to be considered in the context of your request, as they represent reasonably settled views within our Enforcement division. These additional documents take the form of reports (either in final or draft form) relating to AAML [Aberdeen Asset Managers Limited] and to Mr Fishwick.'

The aforementioned documents were also referred to in sections 25 to 34 of an ICO Decision Notice (reference FS50208721), and identified as two draft documents and one finalised document – three documents in total.

Would you please supply all the information contained within the three identified documents, the existence and contents of which has already been fully established and acknowledged by both the FSA and the ICO."

3. The public authority responded to the request on 6 September 2010 at which point it confirmed that it held information falling within the scope of the request. However, it said that this information was considered to be exempt from disclosure and was being withheld. It explained that the information was exempt under section 21 (Information accessible by other means), section 44 (Prohibitions on disclosure), section 40 (Personal information) and section 43 (Commercial interests). Where a qualified exemption had been applied the public authority concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
4. On 16 September 2010 the complainant contacted the public authority to ask that it carry out an internal review of its handling of his request. In doing so the complainant challenged the public authority's reasons for applying the various exemptions it was relying on.
5. The public authority presented the findings of its internal review on 22 October 2010 which upheld its earlier response to the request. The public authority now clarified that section 44 was being applied to all of the withheld information and was engaged because disclosure was

prohibited under section 348 of the Financial Services and Markets Act 2000 which restricts the public authority from disclosing 'confidential information' it has received in carrying out its regulatory functions.

The Investigation

Scope of the case

6. On 8 December 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to withhold the requested information.

Chronology

7. On 28 February 2011 the Commissioner contacted the public authority with details of the complaint. The Commissioner asked for copies of the withheld information clearly marked to show where any exemption was being applied.
8. The public authority responded to the Commissioner on 11 April 2011 and provided copies of the withheld information together with details of why each exemption was being applied. It explained that it had not annotated the information in order to show where the exemptions were being applied because it was satisfied that the section 44 exemption applied to all of the withheld information.
9. The complainant provided further arguments to support his complaint on 1 July 2011. The Commissioner has considered these arguments in reaching his decision in this case.

Findings of fact

10. Split Capital Investment Trusts are a type of investment company that issue different classes of shares including zero-dividend preference shares (zeros) which pay no dividend just capital growth at a pre-arranged rate. These trusts got into trouble in the period 2001 – 2002 as the stock market fell which resulted in the collapse of a number of trusts. Many investors lost their investments.
11. The public authority launched an investigation into the split capital investment trust sector in May 2002 which involved "reviewing some 780 files of evidence; entering 51,000 records on the inquiry's database; listening to some 27,000 taped conversations; 17 site visits;

and well over 70 interviews”.¹ As part of its investigation the public authority looked at the activities of Aberdeen Asset Managers Limited, amongst other firms, and the activities of its then head of investments Christopher Fishwick. As a result of its investigation the public authority set up a fund with the firms involved to compensate investors who had lost out as result of the failure of the trusts.²

12. The Treasury Select Committee itself published a report on the split Capital Investment Trusts and the public authority’s response to the problems in this sector. Amongst other things it found that the public authority could have been more pro-active in identifying and responding to the problems within the sector. It also called for the public authority to publish the findings of its investigations:

“We conclude that investigations currently being undertaken by the FSA should cover all the issues on which we have called for an inquiry. We request that it publish a timetable by which this will be completed. The results of the inquiry should be published. If, because of limitations in the Authority’s statutory powers and responsibilities in respect of investment trusts themselves, the FSA cannot perform the task, then it is for the Treasury to establish a vehicle which can.”³

Analysis

13. A full text of the relevant statutory provisions referred to in this section is contained within the legal annex.

Exemptions

Section 44 – Prohibitions on disclosure

14. The public authority has explained that the information it is withholding constitutes 3 reports which it described in the following terms:
 - A report dealing with the FSA’s investigation into the conduct of Aberdeen Asset Managers Limited with regard to its management of split capital investment trusts between 1 June 2000 and 31 December 2002 (consisting of 284 pages).

¹ <http://www.fsa.gov.uk/Pages/Library/Communication/PR/2004/021.shtml>

² <http://www.fsa.gov.uk/Pages/Library/Communication/PR/2004/114.shtml>

³ <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmtreasy/418/41809.htm>

- A report dealing with the FSA's investigation into the conduct of Christopher Fishwick who was formerly the head of the Specialist Funds Team at Aberdeen asset Managers Limited, which was responsible for the management of split capital investment trusts (consisting of 186 pages).
 - A report entitled "Splits Capital Investment Trusts, Aberdeen Asset Managers Limited" dated 30 April 2004 prepared by the FSA for the purposes of potential settlement and mediation in relation to the investigations regarding split capital investment trusts (consisting of 56 pages).
15. The public authority has applied section 44 to all of the withheld information and therefore the Commissioner has considered whether this exemption would apply in the first instance. Section 44 provides that information is exempt if its disclosure is prohibited under any other law or enactment. In this case the relevant statutory prohibition is section 348 of the Financial Services and Markets Act 2000 ("the FSMA") which provides that:
- (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).
16. First of all the Commissioner would point out that consent has not been granted for the disclosure of the information. The public authority explained that disclosure of confidential information as defined in the FSMA is possible with the consent of both the providers and subjects of the information but that such consent had not been given in this case.

17. The Commissioner has gone on to consider whether the information is confidential within the meaning of section 348(2) of the FSMA. The first condition is that it relates to the business or other affairs of any person. 'Person' has the same meaning as in the Interpretation Act 1978 which states that this should be interpreted as 'a body of persons corporate or unincorporated'. The Commissioner has reviewed the three reports and is satisfied that all of the information can be said to relate to either Aberdeen Asset Managers Limited, other firms in the Split Capital Investment Trust Sector or Mr Fishwick. Therefore the Commissioner is satisfied that this element of the test is met.
18. However, for the statutory prohibition to apply the information must also have been 'received' for the purposes of, or in the discharge of, the functions of the public authority. The public authority has explained that the information contained within the three reports was received for the purposes of its functions of carrying out investigations in order to ascertain whether any regulatory action was required against the firms and individuals involved in the split capital investment trust matter, then achieving a settlement with those involved, including the firms setting up a compensation fund for consumers.
19. The public authority has argued that all of the information contained within the three reports is information it has 'received'. However, it has acknowledged that some of the information is information that has been created internally but argues that while not "in the abstract being 'received' information" is still covered by the statutory prohibition.
20. First of all the Commissioner would say that having reviewed the three reports he has found that the vast majority of the information contained within them is information that has clearly been received by the public authority. It also important to stress that the focus here is on the information contained within the reports. Whilst the reports themselves may not have been physically received by the public authority, insofar as they were generated by the public authority itself, the Commissioner will need to consider whether the information that makes up the reports was received by the public authority.
21. As noted at paragraph 10 the public authority launched a long and thorough investigation into the split capital investment trust sector during which huge amounts of evidence was gathered. The reports requested by the complainant obviously rely heavily on that evidence and include information such as transcripts of telephone conversations, notes of interviews as well as a description of the involvement of various firms and individuals in the split capital investment trust sector that can only have been obtained as a result of the information being passed to, or obtained by, the public authority. Therefore the

Commissioner is satisfied that most of the contents of the reports is very obviously information that has been received by the public authority for the purposes of, or in the discharge of, its functions and as such is covered by the statutory prohibition under section 348 of the FSMA.

22. However, for some of the information, given the nature of an investigative report produced by a regulatory body, the issue of whether the information has been received is less clear cut. That is to say the information focuses more on the public authority's own observations, conclusions or deductions based on the information it has obtained from firms and individuals during the course of its investigation. As noted, the public authority has acknowledged that such information is strictly speaking not 'received' information. However, it argues that this type of information would indicate the content or nature of the information which it had received from firms and individuals given the 'inextricable link' between the two types of information and therefore is covered by the statutory prohibition.
23. In support of its position the public authority referred the Commissioner to the decision of the Information Tribunal in *Civil Aviation Authority v Information Commissioner*.⁴ That case involved a request for information held by the Civil Aviation Authority and which the Tribunal decided was exempt from disclosure under section 44 of the Act by virtue of the statutory prohibition in section 23(1) of the Civil Aviation Act 1982. In reaching its decision the Tribunal considered to what extent the withheld information had been "furnished to" the Civil Aviation Authority. In doing so it considered the approach taken by the Commissioner in another case involving the Civil Aviation Authority which concerned a request for information relating to inspection audits it had carried out at an airport it regulated. In that decision the Commissioner had found that the withheld information could be separated into the following 3 categories:
- Information furnished by the firm to the CAA
 - Information in the form of the CAA's inspector's observations on the firm's business (resulting it appears either from documents the firm furnished or by the CAA visiting the firm's premises)
 - Statements relating to the firm's compliance with CAA requirements and agreed actions
24. In the above case the Commissioner decided that all 3 categories of information was information that was 'furnished' and therefore covered

⁴ Civil Aviation Authority v Information Commissioner [EA/2009/0033]

by the statutory prohibition and this approach was endorsed by the Tribunal.

25. The public authority argued that given the similarity in circumstances it was appropriate to apply the Commissioner's and the Tribunal's approach from the previous case. It pointed to similar factors which it said included "a statutory confidentiality regime in almost identical terms, a large volume of papers to review, and documents which contain the same mixture of the three types of information set out above which is all 'inextricably linked'".
26. The Commissioner has considered the public authority's arguments and considers that in this particular case, given that the reports are overwhelmingly factual, it is appropriate to apply the approach set out above. As regards the public authority's suggestion that the information is inextricably linked, the Commissioner has found that of the less clear cut information a certain amount of information is genuinely 'embedded' with information that has been received. In the Commissioner's view it would not be possible to disclose this information without also disclosing information that has been received by the public authority through its investigation or else attempting to extract the information that had not been received from the information that had would render the information meaningless when taken out of the wider context. In these circumstances the Commissioner has found that the public authority was correct to regard that information as having been received. The Commissioner finds support for this approach in *Slann v The Information Commissioner* where the Information Tribunal found that although the request in that case was for information that, although not directly equivalent to the information received by the public authority, had it been released "it would have been possible to effect a trail leading back to the confidential information".⁵
27. The Commissioner has also found that any remaining information can be categorised as information that, again whilst it may not actually have been received by the public authority, is based upon information that was received to the extent that disclosure would reveal information received by the public authority. For instance, disclosure of the public authority's conclusions or recommendations arising from its investigations would also, to varying degrees, reveal received information on which those conclusions and recommendations were based. The Commissioner also considers that the public authority was

⁵ *Slann v The Information Commissioner and the Financial Services Authority* [EA/2005/0019].

correct to regard this type of information as having been received for the purposes of section 348 of the FSMA.

28. Whilst the Commissioner is satisfied that all of the information falling within the scope of the request was received by the public authority, he notes that information will not be considered confidential, and therefore will not be covered by the statutory prohibition if it has been made available to the public. The Commissioner has considered whether this would apply here as the complainant had suggested that there was already a great deal of information about the problems of the split capital investment trust sector in the public domain. Having considered this the Commissioner has found that the information in the reports has not previously been disclosed. Just because some of the issues will have been discussed in public before does not mean that all information related to that matter will no longer be entitled to protection under the statutory prohibition. The Commissioner has reviewed the withheld information and compared this against the public statements made by the public authority and is satisfied that none of the information can be said to have already been placed in the public domain.
29. The Commissioner has also considered whether in this case section 349 of the FSMA allows for an exception from the statutory prohibition. This section of the legislation provides that section 348 does not prevent 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
30. As regards section 349(1)(a) the Commissioner's view is that the term 'public function' relates to powers conferred on the public authority by legislation and not legislation, such as the Act, to which the public authority is merely subject. Similarly, a disclosure under the Act is not included within the regulations referred to in section 349(1)(b). Therefore the Commissioner has found that section 349 is not a basis for disclosing the withheld information in this case.
31. The Commissioner is satisfied that all of the information requested by the complainant can be said to have been received by the public authority for the purposes of, or in the discharge of, one of its functions and therefore section 348 of the FSMA will apply. Consequently, the Commissioner has found that all of the requested information is exempt from disclosure under section 44 of the Act.
32. The Commissioner appreciates that the complainant has provided submissions on the importance of the information being disclosed and

in particular has referred to the Treasury Select Committee's call for the results of the public authority's investigations to be published. However, this is not something the Commissioner can take into account. Where the statutory prohibition applies the Commissioner must conclude that the information is exempt under section 44, as he has no power or discretion to do otherwise. Furthermore, Section 44 confers absolute exemption from the Act and therefore there is no public interest test to apply.

Other exemptions

33. The Commissioner has decided that all of the requested information is exempt on the basis of section 44 and therefore he has not gone onto consider the other exemptions cited by the public authority. However, whilst he has not made a formal decision on the public authority's application of the other exemptions he would at least query the public authority's application of section 21. The complainant had specifically asked for copies of three reports which were withheld by the public authority in their entirety and which had not previously been disclosed. In this sense it is difficult to see how the information could be accessible to the complainant by other means.

The Decision

34. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act by correctly refusing to disclose the requested information under the section 44 exemption.

Steps Required

35. The Commissioner requires no steps to be taken.

Right of Appeal

36. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

37. 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.
38. 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 7th day of July 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal annex

Freedom of Information Act 2000

Information Accessible by other Means

Section 21(1) provides that –

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

Personal information.

Section 40(1) provides that –

“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.”

Section 40(2) provides that –

“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
- (a) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - 1. any of the data protection principles, or
 - 1. section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Commercial interests

Section 43(2) provides that –

"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)."

Prohibitions on disclosure

Section 44(1) provides that –

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (c) is prohibited by or under any enactment,
- (d) is incompatible with any Community obligation, or
- (e) would constitute or be punishable as a contempt of court."

Financial Services and Markets Act 2000

Restrictions on disclosure of confidential information by Authority

Section 348(1) provides that –

"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."

Section 348(2) provides that –

“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

Section 348(4) provides that –

“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.”

Exemption from section 348

Section 349(1) provides that –

“Section 348 does not prevent disclosure of 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