

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 May 2012

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

Decision (including any steps ordered)

1. The complainant requested the following information in relation to the Parliamentary Ombudsman's report of 2008 into the Equitable Life crisis in 1998: *"I wish to identify the names of the eight life companies referred to in para. 74 who gave 'general cause for concern' and the one life company (other than Equitable Life) who was 'of particular concern'".* The Commissioner's decision is that the Financial Services Authority (FSA) has incorrectly applied the exemption under section 43(2) of FOIA to the requested information. The FSA has also breached sections 1(1)(b) and 10(1) of FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the requested information to the complainant.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant wrote to the FSA and made the above request.

5. The FSA responded on 12 May 2011. It stated that it was refusing to disclose the requested information under sections 44 (1) (prohibitions on disclosure) and 43(2) (commercial interests) of FOIA.
6. Following an internal review the FSA wrote to the complainant on 4 August 2011. It stated that the reviewer had decided that section 44(1) was no longer applicable; however it was upholding the decision not to disclose the requested information under section 43(2) of FOIA.
7. The Commissioner wrote to the FSA on 2 December 2011 requesting its detailed submissions as to the application of the exemption under section 43(2) to the requested information.
8. The FSA replied to the Commissioner on 4 January 2012 with detailed responses to his queries regarding its application of the above exemption.

Scope of the case

9. The Commissioner has considered the FSA's handling of the original request, in particular its application of section 43(2) to the requested information.

Reasons for decision

10. Section 43(2) of the FOIA provides an exemption from a public authority's duty to disclose requested information on the grounds that disclosing the information would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.
11. In *Hogan & Oxford City Council v The Information Commissioner*¹ (*Hogan*) the Tribunal stated that,

"The application of the 'prejudice' test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.. Second, the nature of 'prejudice' being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice". (paragraphs 28 to 34).

¹ EA/2005/0026

12. In this case the FSA has stated that disclosure of the requested information would be likely to prejudice the commercial interests of the firms which are the new owners of the life companies named in the report.
13. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the commercial interests of the firms. The firms all provide financial advice and management services. The requested information relates to the provision of these services. The Commissioner does consider that this relates to the commercial interests of the firms and is therefore satisfied that the withheld information falls within the scope of the exemption. The Commissioner then examined the nature of the potential prejudice.
14. The Tribunal in *Hogan* commented as follows (at paragraph 30):

"Second the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."
15. The background to these companies being mentioned in the Parliamentary Ombudsman's report is that the Government Actuaries Department (GAD) had in 1998 surveyed the approaches of life companies to reserving for annuity guarantees. It was found that two companies, including Equitable Life, did not hold adequate reserves to cover the liabilities which existed in respect of their guaranteed annuity rate policies. These companies gave "particular cause for concern". The other companies gave general cause for concern due to their approach to holding such reserves.
16. As is widely known, Equitable Life took steps to establish significant reserves in order to cover the liabilities which arose from its policies containing guaranteed annuity rates. In relation to the other companies mentioned, the Commissioner has received representations from the firms which now own these companies. Those firms all indicated that the problems regarding guaranteed annuity reserves are historical ones which have all been long since addressed. The requested information relates to a survey carried out by the GAD over 13 years ago which identified problems which are no longer a concern today. However, the firms are concerned that disclosure of the names of the companies will give rise to new unwarranted public concern,

which could lead to policyholders moving their business away from the firms unnecessarily.

17. The FSA has informed the Commissioner that disclosure of the requested information would negatively impact upon the firms which are the new owners of the life companies referred to in the report. The FSA pointed out to the Commissioner that firms operating in the financial services sector regard a good reputation as a valuable asset. Whilst the information contained in the Government Actuaries report is 13 years old, disclosure of the requested information would still be likely to lead to further public comment and speculation which would in turn be likely to lead to adverse consequences for the new owners of the firms. Such consequences could include: -
- Loss of confidence, prompting existing policyholders to re-consider their future investments.
 - Loss of confidence by investors, which would harm the prospect of contemplated commercial transactions. This could have a negative impact upon other brands and products owned by the firms and, for those firms which are listed, a negative impact upon their share price.
18. The Commissioner is satisfied that this is the case and that releasing the requested information could cause the prejudice that section 43(2) seeks to prevent - the prejudice to the commercial interests of any person. Therefore he is satisfied that a causal link has been established between disclosure of the requested information and harm to the commercial interests of the firms which own the eight life companies. Having accepted that any such harm would not be trivial or insignificant, the Commissioner has gone on to consider the likelihood of such harm arising.
19. In the case of *John Connor Press Associates Limited v The Information Commissioner*² the Tribunal confirmed that would be likely to prejudice meant that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.*" (paragraph 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.

² EA/2005/0005

20. The FSA has consulted with the firms and has asked for their representations as to how disclosure of the requested information would damage their commercial interests. The firms have all made such representations and the Commissioner has considered these.
21. The firms have all expressed their concern that, if the requested information were to be disclosed, this may discourage potential new customers from approaching the firms. It may also prompt competitors to encourage existing customers to switch their financial arrangements away from these firms, which would prejudice their positions in a highly competitive market.
22. The firms consider that the above is a very real risk, as the report which refers to the eight life companies was a report into the Equitable life crisis, mentioning the eight companies as ones which also "gave cause for concern." Although the report is over 13 years old, and the companies have since been taken over by the new firms, the new firms are concerned that disclosure without proper context may lead to unfounded concerns among their policyholders, which may lead them to move their financial business away from the firms to their competitors, who may exploit any reaction by the public and the media to the disclosure in order to gain advantage by encouraging policyholders to switch their business to those competitors. This would obviously harm the commercial interests of the companies.
23. In determining the likelihood of prejudice to the commercial interests of the firms, the Commissioner has taken into account the time which has elapsed since the publication of the Parliamentary Ombudsman's report and the possibility that disclosure of the names of the companies could create new problems for the firms which have taken them over. Those firms appear to subscribe to the adage that there is "no smoke without fire" and are greatly concerned that disclosure may lead to concern among policyholders and potential loss of business, even though the information is 13 years old. Whilst the Commissioner acknowledges that there is a possibility that such prejudice could occur he does not find that this is a real and significant risk. Any risk of prejudice could be mitigated by putting the information into its proper context at the time of disclosure and telling the public what was done to alleviate the concerns of the Parliamentary Ombudsman. The Commissioner is of the view that an intelligent consumer will be likely to accept the age and context of the information and will not allow it to cloud his or her view in relation to financial decisions.
24. For the reasons above, the Commissioner finds that section 43(2) is not engaged as the FSA has not demonstrated that disclosure of the information would or would be likely to prejudice the commercial interests of the firms.

Procedural requirements

25. By failing to provide the complainant with the requested information within 20 working days of receiving the request, the FSA breached sections 1(1)(b) and 10(1) of FOIA.

Right of appeal

26. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

27. 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.
28. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**