

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 July 2012

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

Decision (including any steps ordered)

1. The complainant has requested information relating to a section of a consultation paper issued by the Financial Services Authority (the "FSA") entitled *"CP11/5 Protecting with-profits policyholders"*. The FSA disclosed some information, but withheld the rest under the prejudice to the effective conduct of public affairs exemption [sections 36(2)(b)(i) and (ii), and 36(2)(c)]; the exemption for third party personal information [section 40(2)]; the legal professional privilege exemption [section 42]; and the exemption for information the disclosure of which is prohibited by another enactment [section 44].
2. During the investigation the complainant confirmed that he was only seeking to complain about the FSA's use of sections 36 and 42. Therefore this case has focused only on the information withheld under these exemptions.
3. The Commissioner's decision is that:
 - In relation to the information withheld under section 36, this information was correctly withheld under sections 36(2)(b)(i) and (ii).
 - In relation to some of the information withheld under section 42, this information was not exempt under this exemption.
 - However, in relation to the remaining information withheld under section 42, this information was exempt under this exemption.

4. The Commissioner requires the FSA to take the following steps to ensure compliance with the legislation:
 - It should now disclose the information identified in the confidential annex attached to the end of this notice.
5. The FSA 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. The FSA published its consultation paper *"CP11/5 Protecting with-profits policyholders"* in February 2011.¹ This referred to the FSA's Conduct of Business Sourcebook (COBS) 20, which set out rules and guidance on the operation of with-profits funds. The consultation paper explained that various factors, including representations from mutually-owned firms who were concerned over the rules in COBS 20, had led to, *"...what was termed 'Project Chrysalis' and resulted in the publication of two 'Dear CEO' letters in October 2009 and in September 2010 which considered the fair treatment of with-profits policyholders in mutually-owned with-profits funds."*² The intention of the consultation paper was to present the FSA's proposals for a range of changes to its rule and guidance concerning the operation of with-profits funds. It asked for comments to these proposals by 24 May 2011, and stated that once it had received responses it would finalise the changes to its rules and guidance in light of these responses. It then intended to publish a Policy Statement giving feedback later in 2011. Following this it would publish a further consultation paper concerning with-profits business later in 2011.³
7. On 27 July 2011, the complainant wrote to the FSA and made the following request:

¹ http://www.fsa.gov.uk/library/policy/cp/2011/11_05.shtml

² http://www.fsa.gov.uk/pubs/cp/cp11_05.pdf. The two 'Dear CEO' letters are available online at http://www.fsa.gov.uk/pubs/ceo/ceo_letter1016.pdf and http://www.fsa.gov.uk/pubs/ceo/ceo_letter28092010.pdf.

³ http://www.fsa.gov.uk/pubs/cp/cp11_05_newsletter.pdf

"FSA has issued two Dear CEO letters, in October 2009 and September 2010, as well as a recent consultation paper, CP11/05, which explore the regulatory approach to mutual insurers with a with-profits fund..."

In order to better understand the rationale for FSA's counterintuitive approach we are making this freedom of information request, covering:

- 1. Papers submitted to and relevant minutes from the FSA Board, Executive Committee, Executive Policy Committee and Management Actions Review Committee relating to policy discussions and instruction given to the legal advisors, that culminated in the opinion published alongside the second Dear CEO letter; and*
 - 2. Papers submitted to and relevant minutes from the FSA Board, Executive Committee, Executive Policy Committee and Management Actions Review Committee relating to policy discussions that resulted in the assertion in paragraph 2.6 of FSA's CP11/5 that with-profits policyholders in a mutual organisations have the same interest as those in shareholder-owned companies, described as relating to 'the whole with-profits fund and in every part of it'."*
8. The FSA responded on 23 August 2011. It informed the complainant that it held no information that fell under point 1 of his request, but confirmed that it did hold information that fell under point 2. It informed him that some of this information was the personal data of third parties, and as such was being withheld under section 40(2). It also stated that in relation to other relevant information that fell under this request, it considered that sections 36 and 42 applied to this information. However, it had yet to reach a decision on the balance of the public interest test in relation to the application of these exemptions. As such it would provide a further response by no later than 21 September 2011.
9. The FSA wrote to the complainant again on 21 September 2011. It informed him that after carrying out the public interest test it considered that it could disclose some of the requested information to him. However, it also informed him that in relation to the remaining requested information it considered that this was exempt from disclosure under sections 36(2)(b)(i) and (ii), 36(2)(c) and 42(1). In addition to this, it also considered that some of the requested information was exempt under section 44, as its disclosure was prohibited by the Financial Services and Markets Act 2000.

10. The complainant requested an internal review on 30 November 2011. In this he only referred to the FSA's use of sections 36(2)(b)(i) and (ii), 36(2)(c), and 42(1).
11. The FSA carried out an internal review and wrote to the complainant on 11 January 2012. It upheld its previous use of sections 36(2)(b)(i) and (ii), 36(2)(c), and 42(1).

Scope of the case

12. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
13. During the investigation the complainant confirmed that he was only seeking to complain about the FSA's use of sections 36 and 42.
14. Therefore this case has focused on the FSA's use of sections 36 and 42.

Reasons for decision

Section 36

15. In this case the FSA has relied upon sections 36(2)(b)(i) and (ii), and 36(2)(c) to withhold some of the requested information.

16. The relevant parts of section 36(2) state that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

[...]

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

17. This is a qualified exemption, and is therefore subject to the public interest test.

18. The Commissioner has first considered the application of sections 36(2)(b)(i) and (ii). Although these are separate exemptions, because of the interlinked nature of the FSA's arguments, and the withheld information, the Commissioner have considered their application together.
19. Information can only be exempt under section 36 if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, lead to the adverse consequences described in that part of the exemption – in this case the inhibition of the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
20. In order to consider the application of these exemptions the Commissioner will first consider whether the opinion was obtained from a qualified person, and the manner in which this opinion was obtained. He will then consider whether the opinion of the qualified person was reasonable.
21. The FSA has informed the Commissioner that the qualified person in this case was a member of the FSA Board, Margaret Cole. The Commissioner is satisfied that Ms Cole was a qualified person for the FSA.
22. The FSA has also provided the Commissioner with a copy of the submission provided to Ms Cole in order to seek her opinion as to whether this exemption was engaged.
23. After examining this submission the Commissioner notes that it is dated 15 September 2011. This is clearly after the email of 23 August 2011, in which the FSA informed the complainant that the qualified person had decided that section 36 was engaged. However, the Commissioner notes that this submission refers to the qualified person having already seen a sample of the requested information, and having already agreed that the section 36 exemption was engaged. Instead, this submission is primarily asking the qualified person for her opinion as to the balance of the public interest test in relation to the application of section 36 – although the Commissioner notes that it also asks the qualified person to give her opinion on the application of section 36 in relation to additional information that would fall under the scope of the request.
24. The fact that the opinion was not obtained in relation to all of the requested information prior to the exemption being cited as a basis for refusal (on 23 August 2011) represents a flaw in the process followed to apply section 36. However, the Commissioner notes that this was remedied by the qualified person's opinion being obtained in relation to the remaining requested information prior to the issuing of the refusal notice on 21 September 2011.

25. In reaching a view on whether the opinion is reasonable the Commissioner will consider the plain meaning of the word reasonable – i.e. whether the opinion is in accordance with reason, not irrational or absurd.
26. In this instance the FSA has argued that its Board, as its senior decision making body, and the other high level committees named in the request, need a protected space in which to have open and uninhibited discussions on sensitive and “*conceptually difficult*” regulatory issues. To function effectively staff presenting to these bodies need to feel confident that sensitive information, setting out ranges of policy options and a candid analysis of the strengths and weaknesses of those options, will not be disclosed. Members of the Board and the named Committees need to feel confident that discussions between themselves, and between them and contributors/presenters to those bodies, can take place within this protected space. The FSA has argued that the disclosure of this information would be likely to inhibit the free and frank exchange of views within the Board and/or the named Committees, and the free and frank provision of advice to those bodies.
27. The FSA has also stated that at the time of the request this was a live issue, that the review of the rules and regulations on the operation of with-profits funds was still ongoing, and that it had not reached a final position on its policy on this matter.
28. The Commissioner has been provided with a copy of the submissions given to the qualified person at refusal notice stage, together with submissions given to the qualified person for the internal review. These included copies of the withheld information, as well as information supporting a recommendation. He has noted that the withheld information in this case relates directly to this area of policy development, and is taken from records of the discussions of the bodies mentioned in the request, or directly from documents provided to those bodies. Taking these factors into account, and bearing in mind that this was still a live issue when the request was made, the Commissioner is satisfied that the opinion given was reasonable. Therefore the Commissioner is satisfied that sections 36(2)(b)(i) and (ii) are engaged in relation to this information.
29. Sections 36(2)(b)(i) and (ii) are subject to a public interest test. As such, the information can only be withheld if the public interest in maintaining these exemptions outweighs the public interest in disclosure. The Commissioner has first considered the public interest in disclosure.
30. The FSA has recognised that there is a public interest in increasing openness, transparency and accountability. It has recognised that there

is a public interest in allowing stakeholders access to information that will help them to understand the reasoning of the FSA Board and the committees in question in matters which may lead to decisions affecting those stakeholders. Disclosure of the withheld information would allow stakeholders, and the public, to have a more informed debate on this area of policy development, and to engage more fully with the FSA on this issue.

31. The complainant has questioned the proposed changes to the FSA's rules and guidance on the operation of with-profits funds. He has argued that the FSA has only provided stakeholders with limited information to explain and support these proposals, and that it is therefore in the public interest to increase transparency of the development of these proposals. This would, in turn, allow stakeholders to make a more fully informed contribution in this policy development process. This would be in the public interest.
32. On a more general level, the Commissioner also considers that the regulation of the financial sector is an issue that has attracted a large amount of public and political debate, especially during the current economic downturn. He considers that there is a public interest in increasing public understanding of the regulation of firms operating in this sector, and in allowing the public to build up an informed view as to whether that regulation is effective and proportionate. In this instance the withheld information relates to proposed changes to the way in which firms operating in this part of the financial sector are regulated. As such, he considers that the publication of this information would be in the public interest.
33. The Commissioner has gone on to consider the public interest in maintaining the exemptions.
34. In favour of maintaining sections 36(2)(b)(i) and (ii), the Commissioner notes that when considering the public interest consideration should be given to protecting what is inherent in these exemptions – in this instance, the avoidance of unwarranted inhibition to the free and frank provision of advice, or to the free and frank exchange of views for the purposes of deliberation.
35. The FSA has argued that it is in the public interest in preserving a protected space for its Board and more senior committees to have open and uninhibited discussions on sensitive regulatory issues which are very much current.
36. The Commissioner considers that there is a public interest in allowing senior decision making bodies within a regulator (in this case the FSA Board and the committees named in the request) to make decisions on

difficult and sensitive matters. He considers that in order for a fully informed decision to be made, relevant personnel at a public authority should be able to discuss matters in a free and frank manner, exchanging views and exploring the various options.

37. The Commissioner also recognises that it is in the public interest in allowing these senior decision making bodies to be fully briefed, in order to enable them to make fully informed decisions. This is especially the case in relation to the formulation of complex and potentially controversial policy decisions, in this case potentially affecting a large number of stakeholders in the financial sector. The FSA has argued that the disclosure of this information would be likely to inhibit those tasked with briefing the FSA Board and the committees. This would not be in the public interest.
38. As this was still a live issue at the time of the request the FSA has argued that the likelihood of the inhibitory effects set out in these exemptions occurring were particularly high. This would, in turn, be likely to have a harmful effect on the quality of the decision making by the Board and the named committees. This would not be in the public interest.
39. In considering the balance of the public interest the Commissioner recognises that the public interest factors in favour of disclosure are strong in this case. The withheld information relates to the development of a policy which would potentially change the FSA's rules governing a large number of firms and stakeholders operating in the financial sector. The FSA has described this as a "*conceptually difficult*" area of development, and has recognised it as a sensitive one. The complainant has argued that it has the potential to have a damaging effect on firms (and associated stakeholders) operating in this area. Given these factors, the Commissioner considers that there is a strong public interest in increasing the transparency of the development of the FSA's policy in this area, and in allowing the potentially affected stakeholders to make a more fully informed contribution in this process.
40. The FSA has argued that the public interest in disclosure has been somewhat met by the information it has already published, or sent to potentially affected stakeholders. In particular it has referred to the publication of the consultation document "*CP11/5 Protecting with-profits policyholders*", together with the associated consultation process; the two 'Dear CEO' letters that were sent to relevant stakeholders; and its publication of two summaries of the legal advice on which these policy proposals were made. The complainant has countered this, by arguing that whilst some information has been published by the FSA, "*this does not absolve [it] of the responsibility of releasing further information if*

appropriate, especially where the information disclosed this far is inadequate."

41. Although the Commissioner acknowledges the complainant's comments here, he notes that it is a matter of fact that the FSA has contacted and consulted with relevant stakeholders about these proposed changes, both by way of the 'Dear CEO' letters and the consultation document, and has published some information in relation to these communications. Whilst he accepts that the firms and stakeholders potentially affected by these proposed changes may feel that the published information is inadequate, he considers that the published information, together with the consultation process, does go some way to satisfying the public interest in disclosure.
42. As noted at paragraph 32 above, the Commissioner considers that there is a public interest in allowing the public to build up an informed view as to whether the regulation of this section of the financial sector is effective and proportionate.
43. However, this has to be balanced against the public interest factors in favour of maintaining the exemptions, i.e. in favour of avoiding unwarranted inhibition to the free and frank provision of advice, or to the free and frank exchange of views for the purposes of deliberation.
44. In finding that these exemptions are engaged, the Commissioner has already accepted that the disclosure of this information is likely to result in the inhibition set out in these exemptions. However, in considering the balance of the public interest, the Commissioner takes into account the severity, frequency, or extent of any inhibition that would or might occur. In order to determine this, the Commissioner has considered both the nature of the withheld information and the timing of the request.
45. In relation to the nature of the withheld information, he notes that it relates directly to meetings of the FSA bodies identified in the request where the development of this policy was discussed, or to papers that were presented to these bodies in this process. He also notes that the information is detailed, and appears to represent the free and frank exchange of views, and the provision of advice.
46. In relation to the timing of the request, the complainant has argued that when the request was made the consultation process for "*CP11/5 Protecting with-profits policyholders*" had finished, and that all that remained was for the FSA to finalise and publish its decision. During the investigation the Commissioner asked the FSA to provide further submissions on the stage of development of this policy when the request was made. The FSA explained that at the time of the request, although the consultation period had ended, no policy decision had been made

(indeed, the FSA's policy statement was not published until March 2012). Therefore, it has stated, this was a live issue at the time of the request, and the review of the regulation of the operation of with-profits funds was still ongoing.

47. Bearing in mind the FSA's arguments, the Commissioner is satisfied that this information relates to an issue that was live at the time of the request. Whilst he acknowledges the complainant's point that the consultation period had ended by the time of the request, taking into account the FSA's arguments, and the fact that its policy statement was not published under March 2012, he is satisfied that at that time the FSA had not made any final decision on the development of this policy area.
48. Both the complainant and the FSA have indicated that this is a complex and sensitive area with potential ramifications for businesses operating in this part of the financial sector. Bearing this in mind, the Commissioner is satisfied that the development of this policy was, at the time of the request, attracting a reasonable level of public attention – at least from the firms and stakeholders who would be affected by the proposed changes – and that concerns were being raised by those potentially affected about the proposed changes.
49. Given these factors and, in particular, taking into account the timing of the request when a final decision on the proposed policy changes had not been made, the Commissioner considers that were this information to have been disclosed the prejudice argued by the FSA would have been frequent in relation to the FSA bodies who were involved in the decision making process for this policy. Bearing this in mind, the Commissioner finds that the public interest in maintaining these exemptions particularly weighty.
50. Therefore the Commissioner considers that the public interest in maintaining these exemptions outweigh the public interest in disclosure. Therefore the information to which section 36 has been applied to should be withheld under these exemptions.
51. As he has come to the conclusion that all of the withheld information that section 36 has been applied to should be withheld under sections 36(2)(b)(i) and (ii), the Commissioner has not gone on to consider the application of section 36(2)(c).
52. The Commissioner has gone on to consider the use of section 42.

Section 42

53. Section 42(1) provides an exemption for information in respect of which a claim to legal professional privilege ("LPP") could be maintained in legal proceedings. This exemption is subject to a public interest test.
54. There are two types of LPP; advice privilege and litigation privilege. In this case the FSA has not confirmed which type of privilege applies to this information, although it has noted that at the time of the request there was the potential for some litigation in relation to the proposed policy changes. Having considered the withheld information the Commissioner notes that this information relates directly to the proposed policy changes, and the development of this process. As such, the Commissioner has proceeded on the basis that this information may be subject to advice privilege.
55. For advice privilege to apply, the information must record confidential communications, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
56. In this instance, the FSA has applied this exemption to communications between it and its professional legal advisers, or to information directly relating to those communications.
57. Having considered the withheld information the Commissioner is satisfied that it represents communications that, at the time they were made, were confidential; were made between a client and professional legal advisers acting in their professional capacity; and were made for the sole or dominant purpose of obtaining legal advice.
58. However, the Commissioner has gone on to consider whether the right to claim LPP to this information has been lost because of previous disclosures to the world at large, which mean that the information in question can no longer be said to be confidential.
59. The complainant has referred to the publication of two summaries of legal advice by the FSA in relation to its proposals. The first of these summaries was published by the FSA with the first 'Dear CEO' letter in October 2009.⁴ The second summary was published in March 2011.⁵

⁴ http://www.fsa.gov.uk/static/pubs/ceo/chrysalis_lg_adv_1016.pdf. Details of this advice summary are also included in the 'Dear CEO' letter itself - http://www.fsa.gov.uk/pubs/ceo/ceo_letter1016.pdf

⁵ http://www.fsa.gov.uk/pubs/other/fsa_note_of_legal_position.pdf

Given the publication of these summaries he has argued that the information withheld by the FSA under this exemption will no longer attract LPP, and as such should this exemption cannot apply.

60. The Commissioner considers that where legal advice is disclosed outside litigation without any restrictions, it is no longer confidential and therefore is no longer protected by LPP. If only part of the advice is disclosed outside litigation without restrictions, it is possible for the remaining information to keep its legal professional privilege protection, depending on how much the disclosed information revealed about it. If the disclosure did not reveal the content or substance of the remaining information, then the remaining part will keep its quality of confidentiality. Therefore a brief reference to or summary of the legal advice that does not reveal its substance will not lead to a loss of privilege.
61. In order to reach a view on this the Commissioner has referred closely to the information withheld under this exemption. Having done so he has noted that a small amount of the information withheld under this exemption relates very closely to the legal advice summary published in October 2009, and to references to the legal advice referred to in the 'Dear CEO' letter also published in October 2009. Bearing in mind the contents of this particular part of the withheld information, and the information already published by the FSA, the Commissioner considers that the right to claim LPP specifically in relation to this information has been lost because of previous disclosures to the world at large. As such, the Commissioner considers that this information can no longer be said to be confidential. Therefore, the Commissioner considers that this information is not exempt under section 42 and as such should be disclosed.
62. This information is identified in the confidential annex attached to the end of this notice.
63. However, in relation to the majority of the information withheld under section 42, the Commissioner is satisfied that despite the publication of the legal advice summaries, this information can still be said to be confidential. As such he considers that advice privilege applies and therefore section 42 is engaged in relation to this information.
64. The Commissioner has gone on to consider the public interest.
65. In respect of the public interest in disclosure, the complainant has argued that it is clear that the changes proposed by the FSA are clearly informed by and based upon the legal advice it has received. However, in the complainant's view the published summaries are inadequate, and risk providing an incomplete picture, which could be misinterpreted by

stakeholders and thus hamper effective contributions to the consultation.

66. The Commissioner recognises that there is an assumption built into the FOIA that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to their activities.
67. It is clear from the facts of this case that the changes proposed by the FSA would have the potential to affect many firms and stakeholders operating in this area of the financial sector. As noted at paragraph 39 above the Commissioner considers that there is a strong public interest in increasing the transparency of the development of the FSA's policy in this area, and in allowing the potentially affected stakeholders to make a more fully informed contribution in this process.
68. In regard to the public interest in maintaining the exemption the Commissioner considers that:
- It is in the public interest to safeguard openness in all communications between client and lawyer to ensure access to full and frank legal advice.
 - It is important that a public authority is able to seek legal advice so it can make its decisions in the correct legal context.
 - There is an inbuilt public interest in the maintenance of LPP.
69. In considering the balance of the public interest in connection with this exemption, the Commissioner has in particular taken into account the inbuilt public interest in the concept of LPP.⁶
70. Bearing these points in mind, and having considered the withheld information in question, the Commissioner considers that the public interest in maintaining this exemption outweighs the public interest in favour of disclosure. Therefore this information should be withheld.

⁶ *Bellamy v Information Commissioner & Secretary of State for Trade and Industry* [EA/2005/0023], para 35.

Right of appeal

71. 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

72. 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.

73. 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

**Pamela Clements
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