

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2013

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 the professional indemnity insurance of Pentagon Capital Management Plc. The Financial Services Authority (FSA) stated that the information, if held, would be exempt under section 44 (1)(a) of the FOIA and explained that the duty to confirm or deny whether the information is held does not arise under section 44(2).
2. The Commissioner's decision is that the FSA has correctly applied section 44(2) of the FOIA.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 4 September 2012, the complainant wrote to the FSA and requested information in the following terms:

"I am given to understand by the above company that the FSA permitted them to cancel their PII cover from October 2008.

My understanding is that all regulated entities are obliged to insure as part of the process and I find it incomprehensible that an insolvent company handling many millions of pounds of investors' money should be allowed to continue without PII cover.

Will you please:

*a) confirm that regulated businesses are obliged to have PI insurance;
b) you allowed Pentagon Capital Management Plc to cancel their cover,
and,
c) the reason why this was permitted."*

5. The FSA responded on 27 September 2012. With regard to part a) of the request it stated that a firm's PI requirement is driven by the firm's permission, which will determine which prudential rules it is subject to.
6. With regard to parts b) and c) of the request the FSA stated that it could neither confirm nor deny whether it held the information requested, as this would have been information which it received for the purpose of carrying out its regulatory function under the Financial Services and Markets Act 2000 (FSMA), therefore it claimed the exemption at section 44(1)(a) of the FOIA.
7. On 28 September 2012 the complainant responded to the FSA seeking clarification regarding its response to part a) of his request. The complainant further stated that he did not consider that informing him as to whether the FSA allowed Pentagon Capital Management Plc (Pentagon) to cancel their cover could be deemed to be a confidential matter.
8. Following an internal review the FSA wrote to the complainant on 24 October 2012. It reiterated its response to part a) of the request and stated that it had also provided appropriate links to the FSA Handbook on its website where more information could be found on The Interim Prudential Sourcebook for Investment Business and the Prudential sourcebook for Mortgage and Home Finance Firms and Insurance Intermediaries. It went on to clarify that, in accordance with the firm's permissions as shown on the FSA Register, Pentagon is within the category of firms which should have PII cover or a comparable guarantee.
9. The FSA went on to explain that in its original response it had advised that it could neither confirm nor deny if it held the information requested. It further explained that section 44(2) of the FOIA was applicable in that the duty to confirm or deny did not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) of the FOIA would be prohibited by or under any enactment.
10. The FSA then went on to confirm that the information (if held) would have been information received by the FSA from Pentagon for the

purposes of or in the discharge of the FSA's functions under section 348 of the FSMA. Consequently the FSA was unable to confirm or deny whether it held the information requested.

Scope of the case

11. The complainant contacted the Commissioner on 6 December 2012 to complain about the way his request for information had been handled.
12. The Commissioner considers the scope of this case to be to determine if the FSA has correctly applied section 44(2) of the FOIA.

Background

13. In 2008 the United States Securities and Exchange Commission (SEC) filed a civil action against Pentagon and its Chief Executive Officer¹. Pentagon and the firm's CEO disputed the SEC action but in March 2012 a final judgement was made by a US District Court judge in favour of the SEC ordering monetary relief of \$98.6m against the firm and CEO.

Reasons for decision

14. Section 44(1) of the FOIA states that:

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

a) is prohibited by or under any enactment.

15. In its response to the Commissioner the FSA has explained that the FSMA is concerned with the regulation of financial services and markets in the UK. The information (if held) about Pentagon's PII cover would have been received for the purposes of or in the discharge of its functions under the FSMA. That is, for the purpose of monitoring the firm's compliance with the FSA's prudential requirements, monitoring

¹ <http://www.sec.gov/litigation/litreleases/2008/lr20516.htm>

compliance with rules being a function conferred on the FSA under paragraph 6 of schedule 1 to the FSMA.

16. Section 348 of the FSMA states 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.

17. In essence, the operation of the statutory bar is dependent on the consideration of the following issues; firstly, whether the FSA can be classified as a primary recipient, secondly whether the request is for 'confidential information' and if so, thirdly whether there is consent to release of the information or whether this could be obtained.

Is the FSA a primary recipient?

18. A primary recipient is defined at section 348(5) of the FSMA and includes the FSA. The Commissioner therefore accepts that the FSA is a primary recipient for the purposes of the FSMA.

Is the request for confidential information?

19. The FSMA defines 'confidential information' at section 348(2). This describes it as information which relates to the business or other affair of any person and was received by the primary recipient for the purposes of, or in the discharge of, its functions and is not prevented from being confidential.

20. Breaking down the different components of the definition, the Commissioner must consider the following questions when seeking to establish whether the information is 'confidential' –

- Does the information related to the business or other affairs of any person?
- Was the information received by the primary recipient for the purposes of, or in the discharge of, its functions?
- Has the information already been made legitimately available to the public?
- Can the information be anonymised?

21. The Commissioner has first considered if the information requested relates to the business or affairs of another person. A person is not defined in the FOIA therefore the Commissioner has adopted the usual legal interpretation of a person, namely any entity that is recognised as having legal personality to enter into legal relations.
22. The Commissioner is satisfied that the information requested does relate to the business or affairs of another person, in this case Pentagon. He has therefore gone on to consider whether the information, if held, would have been received by the FSA for the purposes of, or in discharge of, any of its functions.
23. Section 348(3) of the FSMA clarifies that for information to be confidential information it does not matter whether the information was received by order of a requirement to provide it under the FSMA. It is the Commissioner's view that it does not matter if information was provided voluntarily to the FSA or under compulsion. The key issue is whether the FSA can demonstrate the function it was discharging when it received the information.
24. Under section 19 of the FSMA any person who carries on a regulated activity in the UK must be authorised by the FSA or be exempt from this requirement. For each regulated activity an 'authorised person' must also identify with which investment type their activities will be concerned. A permission given by the FSA or having effect if so given is referred to in the FSMA as 'a Part IV permission'.
25. The FSA states that the information requested by the complainant would, if held, only have been received from Pentagon in observance of the FSA's role as the regulator of authorised persons. On this explanation, the Commissioner is satisfied that the FSA would have been fulfilling a regulatory function by receiving the information. While this may be the case, however, section 348(4) also states that information may not be deemed confidential information under the FSMA if it has legitimately been made available to the public or can be anonymised.
26. The Commissioner considers that information will only have been legitimately made available where it has already been placed in the public domain without breaching the FSMA. There is no indication that this has occurred here.
27. Section 348(4) of the FSMA additionally stipulates that information cannot be confidential information if it can be summarised or so framed that it is not possible to ascertain from it that information relating to any particular person. The Commissioner does not consider this to be a relevant consideration in this case. This is because the direction of the

request itself, which makes Pentagon its subject, removes the possibility of making the information, if held, anonymous.

28. For the reasons outlined above, the Commissioner has determined that the information is confidential information pursuant to section 348(2) of the FSMA.

If it is confidential information is there consent to release it, if held, or can this be obtained?

29. The FSMA allows that information may be disclosed, if held, in circumstances where consent has been received from the person that provided the FSA with the information.
30. The FSA stated that it would have considered whether to seek consent but that it would also have relied upon its previous experience in cases such as these. It also referred to the Tribunal's decision in the case of Norman Slann and the Information Commissioner and the FSA². Paragraph 36 of the Judgement states:

Failure to obtain consent necessarily engaged the prohibition in section 348(1) of the FSMA.

31. The Commissioner considers that the requested information, if held remains confidential information for the purposes of the statutory bar provided by section 348 of the FSMA. The Commissioner therefore considers that the requested information, if held, would be exempt by virtue of section 44(1)(a).
32. Section 44(2) of the FOIA provides that the duty to confirm or deny that information is held does not apply if the confirmation or denial itself would be prohibited by that enactment.
33. In this case the Commissioner is satisfied that confirming or denying the requested information is held would reveal something to the public about the affairs of the company who are related to that information. Confirming or denying that information is held would therefore fall within section 348 of the FSMA and thus by virtue of sections 44(1)(a) and 44(2) of the FOIA the duty to confirm or deny contained at section 1(1)(a) of the FOIA does not apply.

² EA/2005/0019

34. The Commissioner is therefore satisfied that the FSA is correct to refuse to confirm or deny whether it holds the requested information under section 44(2) of the FOIA.

Right of appeal

35. 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

36. 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.
37. 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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