

Clash of the Titans: Information Commissioner does battle with FSA over information disclosure

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The contest

The last 12 months have seen the Information Commissioner's Office (the "**Commissioner**") square up to the Financial Services Authority (the "**FSA**") over information disclosure. An increasing number of individuals are complaining to the Commissioner regarding the FSA's refusal to disclose requested information relating to regulated firms. The Commissioner has landed some crashing blows on the FSA in a number of cases. Although the FSA has strenuously argued its need to preserve the confidentiality of certain information, the Commissioner has overpowered the FSA, publishing several decision notices ordering disclosure of the information requested. We will now need to see whether the FSA can strike back by overturning the Commissioner's decisions on appeal.

This article explores the arguments employed by both sides in recent cases and the potential implications for our clients: the firms.

The red corner: the FSA

The FSA has vigorously defended its position where the Commissioner has brought cases¹ on behalf of individuals seeking to overturn the FSA's refusal to disclose information requested under Section 1(1)(b) of the Freedom of Information Act 2000 (the "**FOIA**"). The FSA has typically sought to rely on one or more of the following exemptions contained in the FOIA:

- Section 12 - information is exempt from disclosure if the relevant authority estimates that the cost of compliance with the information request would exceed the applicable cost limit, as set out in relevant regulations (the "**costs exemption**");
- Section 31(1)(g) - information is exempt from disclosure if to disclose would or would be likely to prejudice the

exercise by a public authority of its functions for any specified purpose (the "**statutory function exemption**");

- Section 40 - information is exempt from disclosure if it is the personal data of someone other than the applicant and disclosure would result in a breach of the Data Protection Act 1998 (the "**personal data exemption**");
- Section 43(2) - information is exempt from disclosure if disclosure would or would be likely to prejudice commercial interests of any person (the "**commercial interests exemption**"); and
- Section 44 - information is exempt from disclosure if disclosure by a public authority is prohibited under any statute (the "**statutory prohibition exemption**"). The most relevant statutory prohibition is Section 348 of the Financial Services and Markets Act 2000 (the "**FSMA**"), which provides that confidential information must not be disclosed without the consent of the person to whom the information relates.

Note that the exemptions contained in Sections 12, 31, and 43 are "qualified exemptions". That is, their availability is subject to the requirement that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The main points on which the FSA has clashed with the Commissioner have been the availability of the statutory function exemption, and the commercial interests exemption.

Statutory function exemption (Section 31(1)(g))

The FSA has maintained in several cases that disclosure of certain information requested would prejudice its ability to exercise its functions. It asserts that it relies upon informal and voluntary dialogue and cooperation with regulated firms in order to obtain much of the information it seeks. Indeed, in some instances, it is entirely reliant on this mode of

¹ Decision Notice - 7 August 2007 - FS40075781; Decision Notice - 25 April 2008 - FS50123488; Decision Notice - 26 June 2008 - N.B. At the time of writing, this Decision Notice was not available on the Commissioner's website; Decision Notice - 11 August 2008 - FS50106712

cooperation in order to identify problems with firms or in the market generally. Consequently, it only resorts to statutory powers of compulsion where absolutely necessary. If the FSA is required to disclose confidential firm-related information, and is therefore no longer able to provide to firms any assurances of confidentiality, then the specific firm(s) in question, as well as firms in general, may be less inclined to enter into open and candid dialogue and provide information voluntarily on the basis that it remain strictly confidential. As a result, the spirit of cooperation may be lost, firms may provide to the FSA only the minimum amount of information needed in order to comply with their obligations, and the FSA will become increasingly reliant on using its sledgehammer powers of compulsion, where a gentler approach would normally achieve results.

The potential drying up of informal cooperation will have two primary consequences: First, the FSA will become increasingly reliant on its powers of compulsion. The proper utilisation of these powers is expensive and time consuming, and assumes that the FSA knows in advance what information it is seeking. Second, and more importantly, it will mean that the FSA is less able to effectively monitor firms' compliance with regulatory requirements, thus harming the FSA's overall efficiency and effectiveness as a regulator and its ability to perform its statutory functions.

Commercial interests exemption (Section 43)

The FSA has also maintained that disclosure of certain information requested would prejudice the commercial interests of the firm that is the subject of the disclosure, and could cause a wider loss of confidence in the particular market in question. The FSA has argued that, in many instances, the information and/or opinions are requested and released in a non-systematic manner, and without underlying or background information to provide context. Consequently, the information disclosed may provide an incomplete and potentially skewed picture of the qualities of the firm and its business. This may cause the firm to suffer unwarranted media attention, a loss of consumer confidence, and unfounded complaints and litigation.

The blue corner: the Commissioner

The Commissioner has in previous cases allowed the FSA to preserve the confidentiality of information under certain of the exemptions set out above. However, the Commissioner has repeatedly rejected the FSA's attempts to withhold information based upon the statutory function exemption, and the commercial interests exemption, and has accordingly ordered disclosure of information withheld by the FSA on the basis of these exemptions:²

Statutory function exemption (Section 31(1)(g))

Although the Commissioner has accepted that disclosure may in some instances impact on the FSA's relationships with firms, and on the free exchange of views, it maintains that this would not pose a "real or significant risk of prejudice"³ to the FSA's functions. The Commissioner has noted that the FSA has not claimed that firms will stop being open with it, but only that they would be likely to be less open. The Commissioner is also confident that the non-disclosure of information is not essential in order to allow the FSA to maintain its ability to regulate effectively. In particular, it argues that firms will remain generally willing to cooperate and take appropriate steps to rectify any problems. It is in each firm's own interests to do this, and to maintain an open and cooperative relationship with the FSA, in order to ensure that any issues are dealt with without the FSA needing to resort to using its statutory powers. This is true regardless of whether information regarding the firm would subsequently be disclosed. Additionally, the FSA enjoys numerous statutory powers to compel provision of documents and information from firms and third parties. Finally, the Commissioner has noted that it is actually not possible for the FSA to provide any assurances to a firm that it will not disclose information provided informally, given its disclosure obligations under the FOIA.

Commercial interests exemption (Section 43)

In many cases, the information in question will not be prejudicial to the firm's commercial interests, either because of the existing publicity surrounding the firm and the issues that are the subject of the information request, or simply owing to the passage of time. Furthermore, the possibility of "misinterpretation" of the information disclosed is not a valid reason for withholding that information. If required, the FSA could always provide explanations and context to the information disclosed, so as to mitigate the impact of the information on the firm. The Commissioner accepts that disclosure of the information may encourage litigation against the firm that is the subject of that information, but argues that this would not necessarily add significantly to any commercial prejudice already faced by the firm from potential litigation. The Commissioner has rejected the commercial interests exemption on the basis that the public interest in disclosure outweighs the public interest in maintaining the exemption. Firstly, as indicated above, the Commissioner is of the view that disclosure will not prevent full and frank cooperation with the FSA by firms. Secondly, it is necessary for as much information as possible about regulated firms, the way they conduct business, and how they are dealt with by the FSA, to be made available to consumers so that they are able to make informed decisions.

² Ibid.

³ John Connor Press Associates v The Information Commissioner EA/2005/005

Implications for firms

At the time of writing, it is not clear whether the FSA will appeal any of the decisions forcing it to disclose withheld information. In any event, firms are naturally concerned that the information that they provide to the FSA in confidence will ultimately find its way into the public domain.

From the firm's perspective, nothing referred to above affects its disclosure obligations towards the FSA, for example under Principle 11, which provides that a firm must deal with its regulators in an open and cooperative way, and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice, and also under SUP 15 (Notification requirements).

However, the safest course is for firms to assume that the information that they provide to the FSA may have to be disclosed following an information request. We look forward to advising our clients on ensuring that they comply with their obligations in the new battleground of information disclosure.

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