

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 26 May 2011

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

### Summary

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The complainant requested a copy of all of the information that the public authority held about him and a complaint he made to it. The public authority withheld the information under sections 40 and 31. The Commissioner considers that the public authority has applied section 40 appropriately to the names of individuals. However he considers that some of the information withheld under section 40 can be disclosed. He also considers that section 31 is not engaged so therefore the information withheld under this section should be disclosed. The Commissioner also considers that the public authority has breached section 1(1)(a), section 10(1), section 17(1)(b) and section 17(7)(a).

### The Commissioner's Role

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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

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2. On 30 December 2009 the complainant submitted the following request:

*'I hereby lodge an FIA 2000 information request for a copy of all the information that the FSA holds about me and/or my complaint that the FSA had failed to correctly regulate Egg plc.'*

3. On 5 January 2010 the public authority contacted the complainant. It explained that his complaint file contained numerous communications between him and the public authority and that it needed to clarify whether he wanted copies of these. The public authority also explained that the requested information contained a limited amount of personal data which would need to be considered under the Data Protection Act 1998 (the "DPA").
4. On 6 January 2010 the complainant emailed the public authority stating:

*'I would clarify that I'm in possession of all the emails and letters that I exchanged with the FSA in relation to my complaint and therefore don't require a copy thereof'.*
5. On 1 February 2010 the public authority issued a refusal notice. It confirmed that some of the requested information was the complainant's own personal data and could be accessed through the DPA. It withheld some of the remaining information under section 31 and some under section 40. With regard to the application of section 40 the public authority explained that the withheld information constituted the personal data of a small number of its employees who had not corresponded with him in relation to his complaint.
6. On 2 February 2010 the complainant requested an internal review; on 17 March 2010 the public authority confirmed it had carried a review out. It disclosed some of the information it had previously withheld under section 31 and confirmed it was withholding the remaining information under section 40 and section 31.

## **The Investigation**

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### **Scope of the case**

7. On 18 May 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 following points:
  - The public authority's website page about the Freedom of Information Act should explain that a person can make a request in writing via post, facsimile or email, not just via its own forms.
  - The public authority had consciously and deliberately sent its refusal notice on 1 February 2010 therefore it had exceeded the 20 working day limit.

- The public authority consciously and deliberately ignored sections 31(2)(a), (c) and (d) of the Act.
  - The names of the public authority's staff who dealt with his complaint could not be withheld by virtue of section 40(2) because a living individual cannot be identified by name alone; proof of identity (including postal address, date of birth and signature) is also required.
  - The public has a right to know that only designated staff know about and deal with complaints.
  - In order to prevent further regulatory failures from giving rise to a future global financial crisis, the public must know the information that the public authority continues to withhold.
8. The Commissioner has investigated the public authority's handling of the request and its application of the section 40(2) and 31(1)(g) and (2)(b) exemptions.

### **Chronology**

9. On 19 January 2011 the Commissioner contacted the public authority. He requested a copy of all of the withheld information.
10. On 4 February 2011 the public authority provided the Commissioner with the withheld information.
11. On 23 February 2011 the complainant contacted the caseworker. He said he wanted to give his views on what the caseworker should be considering and explained that he would put this in writing too. The complainant said that if the public authority had considered section 31(1)(a), (c) and (d) these would have allowed it to disclose the information. The caseworker explained that this was not the case and that in applying the exemption the public authority had to explain why it was withholding the information. The caseworker also explained that she did not have the remit to consider anything outside of the Freedom of Information Act regime.
12. On 2 March 2011 the public authority confirmed that it had disclosed some information to the complainant which it had previously withheld under section 31.

## Analysis

### Exemptions

13. The public authority applied section 40 and section 31 to the exempt information.

### Section 40

14. Section 40(2) of the Act provides that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the DPA.
15. During the course of the Commissioner's investigation, the public authority disclosed some of the information it had withheld previously under section 40(2). However it argued that disclosure of the remaining information would not be fair and would therefore breach the first data protection principle.
16. For information being withheld under section 40(2) the Commissioner must first consider whether the requested information is personal data. Personal data is defined in Section 1 of the DPA as follows:

*"personal data" means data which relate to a living individual who can be identified -*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.*

17. The information in question consists of the names of junior members of staff and the holiday arrangements of a member of staff whose name had already been disclosed. The names of individuals (particularly as the complainant knows where they work) would be considered personal data. The Commissioner also considers that the information about a named person's holiday arrangements would be considered that person's personal data. Therefore he is satisfied that the withheld information is personal data.

18. The first data protection principle states that:

*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -*

*(a) at least one of the conditions in schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

19. The Commissioner then went on to consider whether disclosure would breach the first data protection principle, as suggested by the public authority and particularly whether the disclosure would be unfair. It is important to note that disclosure under the Act is disclosure to the world at large.
20. The Commissioner accepts that the complainant has a legitimate interest in information about the grade of staff who handled his complaint. He accepts that such information would help reassure the complainant and the public that complaints to the public authority were being handled by staff of a certain grade.
21. The Commissioner notes that while the staff in question worked on the complainant's complaint, they did not correspond with him about it. He also notes that the public authority has confirmed that they were not in public facing roles and that these individuals were of a grade below that of manager. It is the Commissioner's view that these members of staff would have had no expectation that their names would be released into the public domain.
22. The Commissioner is also satisfied that disclosure of their names would not add anything further to the way in which the complainant's complaint had been dealt with. Therefore any legitimate interest in the disclosure of the names of these individuals is outweighed by the prejudice disclosure would cause to the rights and freedoms of the individuals concerned.
23. With regard to the holiday arrangements i.e. what dates a named individual is off on annual leave from work, the Commissioner considers that this information is the named person's personal data. However he does not consider that it would be unfair to disclose this information as anybody could have found that this person was on holiday by simply ringing and asking to speak to him. Further, this type of information is also usually available via an out of office message left on a person's computer.

## Section 31

24. The public authority also applied section 31(1)(g) and (2)(b) to some of the withheld information. Section 31 is a qualified exemption and is therefore subject to a public interest test.
25. Section 31(1)(g) provides that information is exempt from disclosure if to do so would, or would be likely to, prejudice the public authority's ability to carry out its functions for any of the purposes specified in subsection (2). In this case the public authority has cited (2)(b): *for the purposes of ascertaining whether any person is responsible for any conduct which is improper.*
26. During the course of the Commissioner's investigation, the public authority disclosed some of the information it had previously withheld under section 31(1)(g) and section 2(b). The Commissioner has considered the remaining withheld information. He is satisfied that disclosure of this information would not, or would not be likely to, prejudice the exercising of the public authority's function for the purpose of ascertaining whether any person is responsible for any conduct which is improper.
27. Given that the Commissioner is satisfied that section 31 is not engaged he has not gone on to consider the public interest arguments. There is a confidential annex attached which specifies the information that the Commissioner does not consider should be withheld under the Act and therefore should be disclosed.

## Procedural Requirements

28. Section 1(1) of the Act provides that a public authority should inform an applicant whether it holds the requested information and if it does, the information should be disclosed. Section 10(1) provides that a public authority must comply with section 1(1) within 20 working days following the date of receipt of the request.
29. The Commissioner notes that the public authority did not inform the complainant that it held the requested information within the 20 working day time limit. Therefore he finds that the public authority has breached section 1(1)(a) and section 10(1) of the Act.
30. Section 17 provides that a public authority should cite which exemption it is using when it is refusing to disclose requested information. In this case although the public authority cited section 31 as a reason for withholding some of the requested information, it did not make it clear which subsection it was using.

31. Further although the public authority referred to its internal process, it did not give full details of it. It did explain that if the complainant was unhappy with its response, he should contact the person who had issued the refusal notice in the first instance. If that person could not resolve any concerns, then the public authority would provide details of its internal review process.
32. Some public authorities have complaints procedures which have a number of stages or levels. However, the Commissioner does not expect an internal review of a response to an FOI request to have more than one stage.
33. Therefore the Commissioner finds that the public authority is in breach of section 17(1)(a) in that it did not make it clear which subsection of section 31 it was relying on; and section 17(7)(a) as it did not provide full details of its internal review process in its refusal notice.

### **The Decision**

34. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
  - The application of section 40(2) to some of the information.
35. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
  - The application of section 31(1)(g) and (2)(b).
  - The non disclosure of a named member of staff's holiday arrangements.
  - Failure to comply with section 1(1)(a) of the Act.
  - Failure to comply with section 10(1) of the Act.
  - Failure to comply with section 17(1)(a) and section 17(7)(a) of the Act.

### **Steps Required**

36. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
  - Disclosure of the information withheld under section 31(1)(g) and 2(b).
37. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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38. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Other matters**

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39. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
40. The complainant also complained about the fact that the public authority provides an online request for information form. However, the public authority does not explain clearly that a person does not have to use this form to submit a request for information. For a request for information to be valid, it has to be in writing and include the name of the applicant, an address for correspondence and a description of the requested information. A request for information is considered to be in writing where it has been transmitted via electronic means. It also has to be legible and capable of being used for subsequent reference.
41. The Commissioner notes that the public authority has tried to be helpful in that it provides an online request form. However he would expect the public authority to amend its website to include the fact that a complainant does not have to use its online form to submit a request for information.
42. The complainant also complained about the length of time taken to carry out an internal review. He pointed to section 45(2)(e) and section 50(2)(a). He also pointed to the Commissioner's guidance on this.
43. The Commissioner notes that the Act does not specify a time period for carrying out an internal review. The complainant requested an internal review on 12 February 2010 and the public authority confirmed it had carried one out in a letter to the complainant dated 17 March 2010.
44. The Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. There may be a small number of cases which involve exceptional circumstances where it may be reasonable to take longer. In those



circumstances, the public authority should, as a matter of good practice, notify the requester and explain why more time is needed.

45. It is the Commissioner's view that in no case should the total time taken exceed 40 working days. In such cases he would expect a public authority to be able to demonstrate that it had commenced the review procedure promptly following receipt of the request for review and had actively worked on the review throughout that period.

## Right of Appeal

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46. 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: 0845 600 0877
  - Fax: 0116 249 4253
  - Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).
  - Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)
47. 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.
48. 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 26<sup>th</sup> day of May 2011**

**Signed .....**

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

## Legal Annex

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### **Section 1(1) provides that -**

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

### **Section 1(2) provides that -**

Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

### **Section 1(3) provides that –**

Where a public authority –

- (c) reasonably requires further information in order to identify and locate the information requested, and
- (d) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

### **Section 1(4) provides that –**

The information –

- (e) in respect of which the applicant is to be informed under subsection (1)(a), or
- (f) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

**Section 1(5) provides that –**

A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

**Section 1(6) provides that –**

In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny.”

**Section 8(1) provides that –**

In this Act any reference to a “request for information” is a reference to such a request which –

- (g) is in writing,
- (h) states the name of the applicant and an address for correspondence, and
- (i) describes the information requested.

**Section 8(2) provides that –**

For the purposes of subsection (1)(a), a request is to be treated as made in writing where the text of the request –

- (j) is transmitted by electronic means,
- (k) is received in legible form, and
- (l) is capable of being used for subsequent reference.

**Section 10(1) provides that –**

Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

**Section 10(2) provides that –**

Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

**Section 10(3) provides that –**

If, and to the extent that –

- (m) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (n) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

**Section 10(4) provides that –**

The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.

**Section 10(5) provides that –**

Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.

**Section 10(6) provides that –**

In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

**Section 17(1) provides that -**

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

**Section 17(2) states –**

Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

**Section 17(3) provides that -**

A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny

outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(c) Section 17(4) provides that -

A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5) provides that –**

A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

**Section 17(6) provides that –**

Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

**Section 17(7) provides that –**

A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

**Section 31(1) provides that –**

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

**Section 31(2) provides that –**

The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,



- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

**Section 31(3) provides that –**

The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

**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
- (b) 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-
  - (i) any of the data protection principles, or
  - (ii) 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.

**Section 40(4) provides that –**

The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

**Section 40(5) provides that –**

The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
  - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or
  - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

**Section 40(6) provides that –**

In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

**Section 40(7) provides that –**

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.