



**Tribunals Service**  
Information Tribunal

Information Tribunal

Appeals Numbers: **No EA/2008/0075 and 0077**

**Freedom of Information Act 2000 (FOIA)**

Tribunal Deliberations 17<sup>th</sup>. March, 2009

Decision Promulgated 3<sup>rd</sup>. April, 2009

**BEFORE**

**INFORMATION TRIBUNAL**

**DEPUTY CHAIRMAN**

**D.J. Farrer Q.C.**

and

**LAY MEMBERS**

**Malcolm Clarke**

and

**Paul Taylor**

Between

**ROGER ROWLAND**

**First Appellant**

and

**THE FINANCIAL SERVICES AUTHORITY**

**Second Appellant**

**And**

**INFORMATION COMMISSIONER**

**Respondent**

*The Interpretation of FOIA S.44*

## **Decision**

- 1 Both Appeals are dismissed. The Decision Notice therefore stands. Our reasons for dismissing the appeal of the Financial Services Authority (“the FSA”) are set out in a short closed judgment, which will be published only to the Information Commissioner (“the IC”) and the FSA until the date on which the time for an appeal expires or the date on which High Court so orders, whichever is the earlier.

## The Background

- 2 Mr. Rowland became an investor in Fiox Ltd. in 1989. It was managed by Oakland Investment Management Ltd. (“OIM”). OIM arranged the refinancing of Fiox by a sale to Logomode. Mr. Rowland believed that OIM sold improperly, at a gross undervalue, without an independent valuation. The undervaluation of his shares caused him a considerable loss. He and a colleague, Mr. Clark, both complained to Investment Management Regulatory Organisation Ltd. (IMRO), then the regulatory authority under the Financial Services Act, 1986.
- 3 IMRO undertook an investigation into OIM`s handling of the matter. In due course it concluded that Mr. Rowland`s complaint fell outside its remit because of the nature of his relationship with OIM and it discontinued its investigation. Mr. Rowland referred his complaint to the Securities and Investment Board (“SIB”) which upheld the approach adopted by IMRO. Mr. Rowland vigorously asserts that IMRO and SIB were wrong. It is not our task, however, to judge whether that is so.
- 4 The Financial Services Authority (“FSA”) assumed IMRO`s responsibilities by virtue of provisions of the Financial Services and Markets Act, 2000. Mr. Rowland maintained his demand for an investigation of OIM`s conduct.

## The Request

- 5 On 7<sup>th</sup>. March, 2005, Mr. Rowland requested from FSA “ a copy of IMRO `s files that refer to my investment in Fiox Limited.” The FSA replied on 8<sup>th</sup>. April, 2005, confirming that it held the information requested, referring to the exemption conferred by s.43 of FOIA and indicating a need for more time to consider the public interest. On 18<sup>th</sup>. May, 2005, the FSA disclosed some of the requested information but stated that it was withholding other information in reliance on the exemptions in s.43 and s.44, to which latter provision we shall shortly turn. Following further correspondence, Mr. Rowland requested an internal review by letter of 18<sup>th</sup>. July, 2005. By letter of 24<sup>th</sup>. August, 2005, the FSA confirmed its decision, further relying on s.40(2) ( protection of personal data ).
- 6 Following further exchanges of correspondence, Mr. Rowland complained to the Information Commissioner (“the IC”) on 10<sup>th</sup>. February, 2006.

## The Decision Notice

- 7 In the course of the IC `s investigation, which began only in June, 2007, the FSA further invoked sections 21 ( information accessible by other means) and 31(1)(g) ( law enforcement ) of FOIA. The s.21 issue was resolved by agreement and further disclosure was made of information said to be exempted under s.40 and s.43. The IC upheld the withholding of information in so far as it was based on s. 44 and s.40(2) but held that the FSA was not entitled to rely on s.31(1)(g) or s.43(2).
- 8 Mr. Rowland appealed against the decision in so far as it applied s.40(2) and s.44 to his request.

- 9 It was subsequently agreed at a Directions hearing that the information withheld solely under s.40(2) would be provided, subject to redaction of names. That left s.44 as the only outstanding exemption requiring a ruling from the Tribunal.
- 10 At a late stage the FSA appealed the Decision Notice on the very limited ground that it had failed to invoke s.44 in respect of one word in a memorandum created by IMRO in relation to its investigation. It was plainly right that it should have the opportunity to raise the matter, though the document was not identified in the Decision Notice.

### The Issue

- 11 The FSA contended that the information withheld under s.44, generally by the redaction of particular words or phrases, was exempt from disclosure by virtue of s.348 of the Financial Services and Marketing Act, 2000 (FSMA).
- 12 FOIA s.44, so far as material, provides :

#### ***Prohibitions on disclosure.***

- (1) *Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—*
- (a) *is prohibited by or under any enactment,*

FSMA s.348 provides :

#### ***Restrictions on disclosure of confidential information by Authority etc.***

- (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.

- (2) In this Part “confidential information” means information which—
- (a) relates to the business or other affairs of any person;
  - (b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority, the competent authority for the purposes of [Part VI](#) or the Secretary of State under any provision made by or under this Act; and
  - (c) is not prevented from being confidential information by subsection (4).
- (3) It is immaterial for the purposes of subsection (2) whether or not the information was received—
- (a) by virtue of a requirement to provide it imposed by or under this Act;
  - (b) for other purposes as well as purposes mentioned in that subsection.
- (4) Information is not confidential information if—
- (a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or
  - (b) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.
- (5) Each of the following is a primary recipient for the purposes of this Part—
- (a) the Authority;
  - (b) any person exercising functions conferred by [Part VI](#) on the competent authority; (c) the Secretary of State;
  - (d) a person appointed to make a report under [section 166](#);
  - (e) any person who is or has been employed by a person mentioned in paragraphs (a) to (c);
  - (f) any auditor or expert instructed by a person mentioned in those paragraphs.
- (6) In subsection (5)(f) “expert” includes—
- (a) a competent person appointed by the competent authority under [section 97](#);
  - (b) a competent person appointed by the Authority or the Secretary of State to conduct an investigation under [Part XI](#);
  - (c) any body or person appointed under [paragraph 6 of Schedule 1](#) to perform a function on behalf of the Authority.

FSMA s.349 provides :

(1) Section 348 does not prevent a disclosure of confidential information which is—

(a) made for the purpose of facilitating the carrying out of a public function; and

(b) permitted by regulations made by the Treasury under this section.

(2) The regulations may, in particular, make provision permitting the disclosure of confidential information or of confidential information of a prescribed kind—

(a) by prescribed recipients, or recipients of a prescribed description, to any person for the purpose of enabling or assisting the recipient to discharge prescribed public functions;

(b) by prescribed recipients, or recipients of a prescribed description, to prescribed persons, or persons of prescribed descriptions, for the purpose of enabling or assisting those persons to discharge prescribed public functions;

(c) by the Authority to the Treasury or the Secretary of State for any purpose;

(d) by any recipient if the disclosure is with a view to or in connection with prescribed proceedings.

(3) The regulations may also include provision—

(a) making any permission to disclose confidential information subject to conditions (which may relate to the obtaining of consents or any other matter);

(b) restricting the uses to which confidential information disclosed under the regulations may be put.

[

(3A) Section 348 does not apply to—

(a) the disclosure by a recipient to which subsection (3B) applies of confidential information disclosed to it by the Authority in reliance on subsection (1);

(b) the disclosure of such information by a person obtaining it directly or indirectly from a recipient to which subsection (3B) applies.

(3B) This subsection applies to— (a) the Panel on Takeovers and Mergers;

(b) an authority designated as a supervisory authority for the purposes of Article 4.1 of the Takeovers Directive;

(c) any other person or body that exercises public functions, under legislation in an EEA State other than the United Kingdom, that are

*similar to the Authority's functions or those of the Panel on Takeovers and Mergers.*

*f<sup>1</sup>*

*(4) In relation to confidential information, each of the following is a "recipient" –*

*(a) a primary recipient;*

*(b) a person obtaining the information directly or indirectly from a primary recipient.*

*(5) "Public functions" includes–*

*(a) functions conferred by or in accordance with any provision contained in any enactment or subordinate legislation;*

*(b) functions conferred by or in accordance with any provision contained in the Community Treaties or any Community instrument;*

*(c) similar functions conferred on persons by or under provisions having effect as part of the law of a country or territory outside the United Kingdom;*

*(d) functions exercisable in relation to prescribed disciplinary proceedings.*

*(6) "Enactment" includes–*

*(a) an Act of the Scottish Parliament;*

*(b) Northern Ireland legislation.*

*(7) "Subordinate legislation" has the meaning given in the [Interpretation Act 1978](#) and also includes an instrument made under an Act of the Scottish Parliament or under Northern Ireland legislation.*

13 Copies of the withheld information were supplied to us. They consisted of entire letters from OIM to IMRO and excerpts from IMRO documents which revealed information received from OIM . The FSA contended – and the IC found – that this material was "confidential" within the definition in s.348(2) and that the company to which it related had not consented to its disclosure.

14 Mr. Rowland argued :

(i) that the information was not, confidential, as that term is generally understood.;

- (ii) that it was not confidential because it was not *received by the FSA “ for the purposes of, or in the discharge of, any functions of the ( FSA )”, as provided by s.348(2)(b)*;
- (iii) that disclosure was permitted by s.349(1)(a) because it would be “ *made for the purpose of facilitating the carrying out of a public function*”, namely compliance by the FSA with its duties under s.1 of FOIA.
- (iv) that the refusal of consent to disclosure under s.348(1)(a) came from a director who had no authority;
- (v) that disclosure was in the public interest.

### The Reasons for our Decision

- 15 “Confidential Information” is exclusively defined in s.348(2). The information withheld undoubtedly relates to the business of OIM. IMRO `s Statements of Principle have no bearing upon its interpretation.
- 16 Mr. Rowland `s case on (ii) relies on his claim that IMRO did not properly investigate his complaint, erred in law in its view of its jurisdiction and wrongfully amalgamated it with that of Mr. Clarke. That amounts to an assertion that the FSA or its predecessor did not properly discharge their functions. If that were right – and it is not the function of this Tribunal to make judgments on such issues – it would not affect the function which it was performing or the purposes it was serving when receiving that information, for the purposes of s.348(2)(b).
- 17 Compliance with the requirements of FOIA is not the performance of a function, public or private, of FSA. It is merely obedience to the statute. If it were such performance, no regulations have been made under s.349 permitting such disclosure.
- 18 There is no evidence that OIM consented to disclosure. That being so, it is immaterial whether the recorded refusal of consent was authorised or not.



19 The exemption conferred by s.44 is absolute. If engaged, no issue of the public interest arises.

20 Accordingly, we reject Mr. Rowland`s contention that the FSA wrongly asserted the exemption provided by s.44 in refusing disclosure of the information contained in the documents which it withheld in reliance on that provision.

21 This appeal is dismissed. The Decision Notice therefore stands, subject to such disclosure as has been made as agreed at the directions hearing referred to in paragraph 9.

David Farrer Q.C.  
Deputy Chairman

3<sup>rd</sup>.April, 2009



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*Annex to the judgment*

- 1 The FSA appealed at a late stage against the Information Commissioner`s Decision Notice on the narrow ground that it required disclosure of a memo created by the enforcement division of IMRO referring to “numerous complaints received by IMRO in the course of the investigation”. It is argued by the FSA that “numerous” should be redacted as it constitutes “confidential” information and its disclosure is prohibited by s.348 of FSMA. The IC supports that contention.
  
- 2 We disagree. The fact that there were numerous complaints is not information received by IMRO as provided for by s.348(2)(b). What IMRO received was the substance of each complaint. That they were numerous is a fact established by IMRO. The fact of a communication is quite different from the content of that communication.
  
- 3 Furthermore, we are of the opinion that, even were this confidential information, it would fall within the exception provided for in s.348(4)(b), since it is in a summary from which no information relating to a particular complainant can be ascertained. That there were complaints against OIM is information in the public domain.
  
- 4 Accordingly we dismiss this appeal. The Decision Notice will stand. This very limited information must be disclosed since no other exemption applies to it.

David Farrer Q.C.  
Deputy Chairman

3<sup>rd</sup>. April, 2009