FSA ordered to make disclosures under Freedom of Information Act

Oct 18 2010 Bridget C. Treacy

In a recent decision, the UK Information Commissioner ordered the Financial Services Authority to make further disclosures of information in response to a request under the Freedom of Information Act 2000 (Case Reference FS50286155). In requiring additional disclosure, the commissioner rejected the FSA's overly technical reliance on certain exemptions. In particular, the FSA argued that s348 of the Financial Services and Markets Act 2000 prevented the FSA from disclosing confidential information without consent, thereby providing a general exemption against disclosure of information under the FoIA. The commissioner rejected this interpretation, noting that scope of the exemption was considerably narrower, but he upheld most of the FSA's assertions that the commercial prejudice exemption would prevent other disclosures. The commissioner's careful and detailed approach, which required a number of further disclosures, may encourage firms to consider using the FoIA proactively to request a range of information from the FSA.

The UK's FoIA came into force in 2005. There was much anticipation, particularly on the part of journalists, that easier access to information held by public authorities would transform the public and political landscape. The FoIA was intended to be "applicant blind", with a presumption in favour of disclosure of information unless an exemption prevented disclosure. The reality of FoIA has been somewhat different, in part because many public authorities have relied heavily on exemptions to minimise disclosure.

Compared with other jurisdictions, the UK was much later in enacting FoI legislation. For example, the US' equivalent FoIA legislation is now almost 45 years old. In contrast to the UK, the US experience demonstrates high levels of use by businesses, which notably use it to obtain information about competitors, particularly in the context of bids for public sector projects. Further, in the US, FoIA is used routinely in litigation. The experience in the UK so far has been very different. It seems that a high proportion of UK requests has been made by journalists and individuals, with relatively few from businesses seeking information about competitors. Anecdotally, however, there does seem to have been a growing use of FoIA in the context of litigation. The present case is particularly interesting against this background. It is part of a protracted attempt by a journalist to gain access to information the FSA holds about Leeds City Credit Union. Specifically, the complainant sought details relating to the FSA's "concerns that LCCU's management was not operating according to established and accepted rules".

In responding to the request, the FSA confirmed that it held information falling within the scope of the request but refused to disclose it, relying on a range of exemptions, including: that that the information was exempt because of the operation of s348 of the FSMA;that some of the information was personal data and therefore could not be disclosed under the FoIA; that disclosure would be likely to prejudice the exercise of the FSA's functions for the purposes of ascertaining whether there were circumstances which would justify regulatory action; and that disclosure of the information would be likely to prejudice the commercial interests of LCCU.

Turning to examine the commissioner's approach to the application of the exemptions, his comments concerning the FSMA are perhaps of greatest interest, not least because the FSA argued that this exemption applied to all of the requested information. The commissioner determined that the withheld information fell into three categories: (i) information provided to the FSA by another person; (ii) factual observations; and (iii) the FSA's decisions, deductions, opinions and commentary based on the information in (i) and (ii). The commissioner decided that the exemption only applied to the information actually received, not to the FSA's opinions, deductions or extrapolations (although this information might be covered by other exemptions). The commissioner considered carefully whether the contested information was already in the public domain, as asserted by the complainant, but concluded that it was not.

Overall, the commissioner was somewhat critical of how the FSA applied the exemptions, noting that in some cases it had even applied different exemptions to withhold individual words within the same sentence. The commissioner reviewed the material in detail and provided separate comments to the FSA as to whether information was properly withheld, or not. The decision signalled that despite its

sensitive role as financial services regulator, the FSA could not rely on blanket exemptions to avoid disclosure under the FoIA.

The FSA's reliance on another available exemption, whereby disclosure would prejudice the exercise of a public authority's function, was also considered. Here, the FSA had relied heavily on the fact that informal communication played an important role in the exercise of its supervisory function and that the disclosure of such discussions would make firms less likely to engage with the regulator or provide information informally. The commissioner considered that this raised only a slight risk given the requirements of principle 11 of the FSA's Principles for Business, which requires firms to cooperate, and firms' desire to offset any steps taken against them to avoid formal enforcement action.

Perhaps understandably, the FSA did prevail in its arguments that certain disclosures would prejudice the commercial interests of a person. Here, the commissioner noted that while some information was already in the public domain, the information might generate further debate and comment and fuel further speculation about the credit union. The commissioner therefore ordered the disclosure of some but by no means all of the material requested under the FoIA in this case. What is perhaps more significant is the fact that the commissioner was so critical of the general approach to disclosure taken by the FSA. Firms may wish to consider afresh the merits of making FoIA requests of the FSA. If used carefully, this may provide an opportunity to elicit details about competitors and their activities (subject to the commercial interests exemption). Further, the FoIA is likely to become used routinely in litigation, much as subject access requests are now standard procedure in employment litigation. To date, there has been a mere handful of contested FoIA requests concerning the FSA, but the number looks set to increase in the near future.

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