Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0002
ON APPEAL FROM
Information Commissioner's Ref: FS50082955

Determined on the papers
On 7 April and 9 May 2008

Decision Promulgated
13 May 2008

BEFORE

CHAIRMAN

ANDREW BARTLETT QC

and

LAY MEMBERS

DAVID WILKINSON
DAVE SIVERS

Between

ANTHONY CRAVEN

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

The Appellant in person
For the Respondent: Jane Oldham

Decision

The Tribunal upholds the decision notice dated 2 January 2008 and dismisses the appeal.

Reasons for Decision

Introduction

1. This appeal is brought by Mr Craven, who runs a national support group, called HIPS(97), for victims of failed home income plans. He has built up considerable expertise on the matter of home income plans and has been campaigning for a number of years. We were shown a recent email from the daughter of a gentleman who suffered a loss which has not been compensated, and a letter from Dr Lynne Jones MP, referring to the injustice over home income plans, which has dragged on for many years. This appeal is concerned with a report on the sale of home income plans written many years ago by the Financial Intermediaries Managers and Brokers Authority ("FIMBRA").

The request for information

2. By letter of 7 March 2005 to the Financial Services Authority ("FSA") Mr Craven requested a copy of a report by FIMBRA on the West Bromwich Building Society ("WBBS"), written in the early 1990s. The FSA in its response confirmed that it held a version of a draft report satisfying this description, but declined to release it.

3. Upon internal review by the FSA, the FSA released to Mr Craven a copy of a statement made in open court in a libel action brought by WBBS arising from the leaking of the draft, but maintained its refusal in relation to the draft report itself, relying on the Freedom of Information Act ("FOIA") s43 (prejudice to commercial interests) and s44 (information subject to a prohibition on disclosure). The Building Society had been contacted by FSA but had refused its consent to the release of the draft report.

The statutory provisions

4. The information request was made in pursuance of FOIA s1. The material parts of the two sections relied on as justifying the refusal to release the information are as follows:

> 43(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
>
> 44(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 ...

5. The s43 exemption is qualified, being subject to the public interest test set out in s2(2)(b). The s44 exemption is absolute: see s2(3)(h).

6. The prohibitory enactment relied on for the purpose of s44 was the Financial Services and Markets Act 2000 ("FSMA") s348. This provides, in essence, that information received by the regulator in the course of its functions relating to someone's affairs must not be disclosed without the consent both of the person from whom the information was obtained and of the person to whom the information relates, unless the information has already been lawfully made available to the public. The material terms of the section are:

> 348(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)…

(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; ...

(5) Each of the following is a primary recipient for the purposes of this Part--

(a) the Authority…"

7. FSMA s349 provides for exceptions to the prohibition in s348. Broadly, information may be disclosed in pursuance of defined public functions.

The complaint to the Information Commissioner

8. By letter of 9 July 2005 Mr Craven complained to the Commissioner, who commenced his investigation in October 2006.

9. As a result of information from Mr Craven the Commissioner discovered that the FSA held two versions of the draft report. The draft originally referred to by the FSA was a draft of February 1994. The second version held by the FSA was dated June 1994. The Commissioner considered the circumstances surrounding the discovery of the later version and in his decision notice accepted that it was the February version to which Mr Craven's request related.

10. The Commissioner was given confidential access to the February draft. He considered that the contents fell into two categories: (a) background information obtained by FIMBRA and (b) opinions expressed on behalf of FIMBRA. He decided that the *background information* was covered by s44, because it was information received by FIMBRA relating to the affairs of the Building Society, the Society had withheld its consent, and the information had not been lawfully made public. The background information therefore could not be disclosed.

11. He considered that the *opinions* were not covered by s44. He took the view that s348 was applied by FSMA s349 and Part V of the FSMA (Disclosure of Confidential Information) Regulations 2001 to information obtained by the FSA's predecessor organisations including FIMBRA. But s348 did not apply to the opinions because FIMBRA did not receive the opinions from others but generated them itself, and because the FSA did not receive them from FIMBRA but had by statute succeeded to FIMBRA's functions.

12. The Commissioner therefore considered the application of s43 to the opinions. In his view the opinions constituted information protected by s43 because of a real risk of damage to the Society's commercial interests, and on applying the public interest test he considered that the public interest in maintaining the exemption for the opinions outweighed the public interest in disclosure. He therefore decided that the FSA had dealt with Mr Craven's request in accordance with FOIA, and that no part of the February 1994 draft report should be disclosed.

13. The FSA had originally made the same distinction as the Commissioner, and had similarly relied on s43 in relation to the opinions and s44 in relation to the background information. However, on reconsideration, the FSA had taken the view that s44 applied to the whole document, on the basis that neither the FSA, nor its formal predecessor the Securities and Investment Board (under whose supervision FIMBRA functioned), had generated the opinions, and thus the whole of the draft represented information received from another person. The Commissioner in his decision notice rejected this reasoning.

The appeal to the Tribunal

14. Mr Craven appealed to the Tribunal. His central ground of appeal was essentially that the report was already in the public domain, and therefore neither s43 nor s44 applied to it. He contended as follows:

    (1) The report was leaked by its author, a senior legal officer of FIMBRA.

    (2) The report was quoted in the press and on BBC radio, and during the proceedings of a Treasury Select Committee.

    (3) The report was used and quoted in a High Court action by WBBS against FIMBRA in which WBBS alleged that the report was defamatory.

    (4) The report was used, quoted and verified in a High Court action by the Investors' Compensation Scheme against WBBS.

15. On the question of commercial prejudice to the interests of WBBS, he submitted that such sensitivities should be given little weight because of the nature of WBBS's

conduct and its effects on pensioners. In his view WBBS was not deserving of commercial protection.

16. He also contended, in regard to the public interest issue, that (1) no further claims could be brought by the majority of investors against WBBS, since the Investors' Compensation Scheme had sole rights where compensation had been awarded, and in any event it was highly likely that the statute of limitations would now bar any fresh action, and (2) it was not his intention to publicise the report if he was granted a copy of it.

17. The appeal contained no challenge to the Commissioner's finding that it was the February 1994, not June 1994, version to which Mr Craven's request related. Nor was there any challenge to the Commissioner's view that s44 did not apply to the opinion elements of the draft report. The FSA did not apply to be joined to the appeal.

18. The Commissioner resisted the appeal on the basis that the reasoning and conclusions in his decision notice were correct, and were not undermined by the contentions put forward by Mr Craven on appeal.

The nature of the draft report

19. The draft report was made available to us in confidence. It was in the nature of an early draft, and self-evidently incomplete. The actual contents fell short of what was indicated by the contents list at the start. It consists of 35 pages. The "Conclusion" listed on the contents list is not included in the draft. The text was unfinished and the appendices were not included.

20. The headings on the title page included: "Draft Interim Report", "Strictly Private and Confidential", and "First Draft".

21. The Commissioner's findings of fact in his decision notice give the impression that WBBS had never seen or been given a copy of the draft report. That is not correct, as is clear from a confidential letter from WBBS to the FSA dated 26 October 2007. However, it was also apparent that WBBS did not have the opportunity to influence the contents of the draft report, that the draft could not be regarded as a complete

or balanced document, that it might therefore be inaccurate or misleading in one respect or another, and that it did not receive internal approval within FIMBRA.

The leaks and the High Court actions

22. The disclosure of the draft, which Mr Craven says was by Mr Robert Guest, the author of the draft, took place in 1994-95. We have only sketchy information from the parties concerning the extent to which disclosure spread more widely at that time, except that there were reports in the news media, and the draft was referred to in Parliament, in the proceedings of the Treasury and Civil Service Committee, on 27 March 1995. On that occasion Mr O'Brien MP gave a summary of the contents of the draft, with some quotations from it. Mr Craven himself read a copy of the report but did not retain it.

23. In 1995 WBBS brought an action against FIMBRA and Mr Guest for libel, which was settled by the statement in open court to which we have referred, and the text of which we have. There was no adjudication in that action on whether anything stated in the draft was true or untrue. The statement expressly says that the disclosure was unauthorised, and we so find.

24. In the same year the Investors' Compensation Scheme commenced a claim against WBBS for damages, which culminated in a High Court judgment in 1999: Investors Compensation Scheme Limited v West Bromwich Building Society 15 January 1999, Evans-Lombe J. This covered many of the same topics as the draft report, running to 211 pages and containing a wealth of detail.

The relevance of public disclosure

25. We have mentioned that Mr Craven's central ground of appeal was essentially that the report was already in the public domain. This needs some refinement in order to produce a legally valid argument.

26. If the draft report were fully in the public domain, there would be no purpose in requesting it under FOIA. There would also be no basis for disclosing it under FOIA, for by FOIA s21 information which is reasonably accessible to the applicant by other means than a FOIA request is exempt from disclosure under FOIA.

27. Mr Craven said in his notice of appeal “I readily obtained the minutes of Treasury Select Committee meetings and reports by the media (including BBC radio) which were available to the public.” This demonstrates that the parts of the report which entered the public domain by this route were reasonably accessible to Mr Craven by means other than a request under FOIA.

28. We therefore take Mr Craven’s appeal to relate to the information in the draft report which did not enter the public domain as a result of the leak or by means of the judgment given by Evans-Lombe J. Mr Craven’s argument is effectively a contention that, since the information in the draft is partly in the public domain, the remainder of the information should also be disclosed.

29. From the limited materials made available to us, it does not appear that the whole of the draft was revealed by the Treasury and Civil Service Committee.

30. We asked the Commissioner for submissions on what matters were contained in the draft which were not fully or substantially contained in the judgment of Evans-Lombe J.

31. The Commissioner provided us with closed submissions as requested. We were surprised to discover that the Commissioner had not previously considered the judgment, but found the submissions to be of assistance. The submissions identified a significant quantity of material in the draft report which was not contained in the judgment. Mr Craven also made submissions on this aspect: he identified four topics which he considered were not substantially dealt with in the judgment.

32. We were satisfied that there were some elements of information in the draft which were not readily available to the public, and which were therefore the proper subject of a FOIA request. We will call these the “unrevealed” elements of information, notwithstanding that certain journalists and MPs, and even Mr Craven himself, may have seen them, since they are not readily available to the applicant as a member of the public via the proceedings of the Treasury and Civil Service Committee or the judgment of Evans-Lombe J.

33. We therefore turn to consider the unrevealed elements of information in the draft report.

The unrevealed background information

34. The question here is whether the unrevealed background information in the draft report was protected from disclosure by FOIA s44 on account of FSMA s348. The following features appear to us to be beyond dispute:

    (1) The unrevealed background information in the draft report relates to the affairs of WBBS.

    (2) The unrevealed background information was received by FIMBRA for the purpose of its regulatory functions.

    (3) There has been no consent from WBBS to the disclosure of any of the background information.

35. The only remaining issue on the application of s44 is the effect of FSMA s348(4) in the particular circumstances. The relevant part of s348(4) provides that information is not subject to the ban on disclosure if it has already been made available to the public without breaching s348. This can occur in a variety of ways permitted by s349, often referred to as ‘gateways’.

36. From the very nature of the case s348(4) cannot apply here, since we are considering only the unrevealed background information. The unrevealed background information has not been lawfully made available to the public. Those who saw it did so as a result of an unauthorised leak. Mr Craven argued that the leak was effectively a gateway because the information became public as a result. We are unable to agree. The leak was itself in contravention of s348.

37. Accordingly we conclude that the unrevealed background information is protected by the s44 exemption.

38. Section 44 is an absolute exemption. The unrevealed background information cannot lawfully be disclosed under FOIA. In these circumstances it is unnecessary

for us to consider the possible application of s43 to the unrevealed background information.

The unrevealed opinions

39. The Commissioner relied solely on FOIA s43 in relation to the opinions in the draft report.

40. Section 43 is only engaged if disclosure under the Act "would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)".

41. Whatever views may be held on whether WBBS is deserving of commercial protection, we cannot accept the relevance of Mr Craven's submission that they are not. That is because the relevant question for the Tribunal is not whether WBBS deserves protection, but simply whether there is a sufficient likelihood of prejudice within the meaning of s43.

42. We also cannot accept the relevance of his point that it is not his intention to publicise the report if he is granted a copy of it. His intention may change, and in any event disclosure under FOIA is disclosure to the public for all purposes, without restriction.

43. WBBS submitted to the Commissioner that release would seriously damage its commercial interests and generate negative publicity in that it might harm the continuing relationship between the Society and existing equity release borrowers, affect its ability to win new business, affect consumer confidence in the Society, expose the Society to the risk of further claims, and undermine confidence in the Society with potential adverse consequences for shareholding members.

44. We have taken into account the submissions of Mr Craven concerning the age of the information, the transfer of investors' rights to the Investors' Compensation Scheme, and the likely effect of the statute of limitations, but it is clear to us that there would be a likelihood of prejudice to the commercial interests of WBBS if the unrevealed opinions were disclosed under FOIA. The opinions are critical of WBBS and are expressed in strong terms. Despite the severe damage already done to the

reputation of WBBS by the findings of Evans-Lombe J, we are unable to take the view that WBBS has no reputation at all to protect or that it cannot be damaged any further. Disclosure of the unrevealed opinions would in our judgment be damaging to the commercial interests of WBBS.

45. We therefore find that the s43 exemption applies.

46. The next question is where the balance of public interest lies. The information must be disclosed unless the public interest in maintaining the s43 exemption outweighs the public interest in disclosure.

47. We identify the following factors in favour of disclosure:

(1) The subject matter of the draft report – home income plans – is a matter of real public interest, having regard to the well known and extensive problems caused by the sale of such plans.

(2) There is a value in openness about what went wrong with the sale of such plans. This may assist recompense, educate consumers, and reduce such problems in the future.

(3) Since much that is in the draft report is already in the public domain, the interference with the privacy of WBBS's business affairs would be relatively limited.

(4) The events considered in the draft report took place many years ago.

(5) The events considered in the draft report still have continuing effects.

48. Against the above, we must weigh the factors in favour of maintaining the exemption. These appear to us to be:

(6) The prospect of harm to the legitimate interests of WBBS and its current investors.

(7) The fact that the report was an unvalidated first draft, lacking internal approval within FIMBRA. The opinions may be incorrect and inadequately substantiated. As the FSA said in its internal review letter, the report was never

finalised, was not intended for publication, and lacked both authorisation and external validation.

(8) The fact that the unrevealed opinions on their own, in the absence of the background information which is protected by s44, would be of little value to the public.

(9) The fact that most of the circumstances referred to in the report were investigated in the High Court damages claim, and criticisms of WBBS were either upheld or dismissed, as the case may be, so that there is a limited public interest in revealing the remainder of the matters. Compensation has been paid to those who made justified claims.

(10) The unverified opinions would be of little benefit to any consumers still in a position to bring a claim and would not provide a sound basis for any claim.

49. We have weighed the above factors in the light of all the material made available to us. In our judgment the factors favouring the maintenance of the exemption strongly outweigh the factors in favour of disclosure. In coming to that conclusion we place particular emphasis on factors (7), (8) and (9).

50. We have not included in the above analysis any consideration of the position of the FSA, including possible damage to the FSA's interests and to the integrity of its regulatory processes. The FSA stated in its internal review letter: "It is in the public interest that the FSA has open and candid exchanges of information and views with its firms, regardless of the commercial sensitivity of the information. Disclosure to the public of this draft report may undermine the willingness of regulated firms to engage in a dialogue with us. The result could be a drying up of information to, and cooperation with the FSA, which would harm its effectiveness in carrying out its functions."

51. The Commissioner considered that the FSA's position was not relevant. It is not necessary for us to arrive at a conclusion on that point, but we would not wish to be understood as endorsing the Commissioner's view that the FSA's position was irrelevant. If the FSA's position ought to be taken into account, that would further strengthen our judgment that in the circumstances of the present case the public

interest in the maintenance of the exemption outweighs the public interest in disclosure.

Conclusion and remedy

52. For the reasons set out above, we have reached the conclusion that the Commissioner's decision was correct and in accordance with law. The unrevealed background information is protected from disclosure by FOIA s44 and FSMA s348. The unrevealed opinions are protected from disclosure by FOIA s43, having regard to the balance of public interest. The appeal is dismissed.

53. Our decision is unanimous.

Signed

Andrew Bartlett QC

Deputy Chairman Date: 13 May 2008