Information Tribunal Appeal Number: EA/2005/0019

FREEDOM OF INFORMATION ACT 2000

Heard at Harp House London
On 8 June 2006

Decision Promulgated

11 July 2006

Before

Mr. David Marks
INFORMATION TRIBUNAL DEPUTY CHAIRMAN

And

Mrs Suzanne Cosgrave and Mr Henry Fitzhugh
LAY MEMBERS

Between

NORMAN SLANN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

FINANCIAL SERVICES AUTHORITY

Joint Party

DECISION

The Tribunal upholds the Information Commissioner's Decision Notice dated 26 September 2005 and dismisses the Appeal.

Reasons for Decision

General

1. This is an appeal by the Appellant, Mr Norman Slann, against a Decision Notice of the Information Commission (the "IC") dated 26 September 2005 which upheld a decision of the Financial Services Authority (the "FSA") not to disclose certain information relating to specific statistics provided by a number of building societies to the FSA described in further detail below and previously requested by the Appellant. The appeal took the form of an oral hearing at which Mr Slann appeared in person. The Tribunal had previously ordered the joinder of the FSA which was represented by Mr Jason Coppel of Counsel whilst the IC was represented by Mr Timothy Pitt-Payne of Counsel. The Tribunal is grateful to all parties for their submissions, many of which were in written form including several earlier written exchanges in the form of correspondence between the various parties. These materials considerably assisted the Tribunal in resolving the critical issues in the Appeal. In addition the Tribunal had the benefit of some written evidence principally from a Mr Reginald Clarke on behalf of the FSA who was cross examined at the Appeal by Mr Slann.

2. The Tribunal feels it is unnecessary to go into the procedural history of this Appeal save to mention that at one stage in November 2005 at a time when the Tribunal issued directions both as to the joinder of the FSA and as to evidence generally Mr Slann wrote to the Tribunal's offices stating that he felt inclined to withdraw his appeal given his feeling that the proceedings had by then "gone beyond my level of understanding". However, by early 2006 he had applied to reinstate his appeal and permission was duly given for him to do so.

3. As will be explained below the Tribunal is fully conscious of the fact that many of Mr Slann's concerns go beyond the scope of the issues which form the subject matter of the Appeal. This was evidenced not only by the content

of many of his written exchanges but also by his submissions during the Appeal which on occasion consisted of a recital of complaints both generalised and particular and many of which were levelled against both the FSA and the building society industry in general. Although the Tribunal fully recognises the sincerity with which Mr Slann made these submissions, they tended to distract all parties from being able to focus upon the principal issues in the Appeal, and what is within the jurisdiction and purview of the Tribunal.

Background to request

4. The background to the Appellant's request lies in what can be broadly described as information gathering on the part of the FSA in carrying out its functions as the regulatory body charged with overseeing the financial services industry in general and activities of building societies in particular. Building societies are under a duty to provide details of their monthly balances and of their monthly interest rates so as to enable the FSA to collate and relay the said information in a composite form to other Government and Government related agencies and bodies. These agencies and bodies in turn utilise the collated information for a variety of purposes. In particular the Office for National Statistics (ONS) has employed the data in question for present purposes to determine the Mortgage Interest Rate (MIR) which is then in turn employed (or at least was in relation to this Appeal) in relation to the operation of the benefits system.

5. Prior to making his formal request in January 2005, Mr Slann had for a considerable period of time beforehand expressed his wish to be acquainted with the information described in general terms in the preceding paragraph. The Tribunal does not find it necessary to refer to these earlier exchanges save to note that it was clear even during the hearing of this Appeal that Mr Slann felt a genuine sense of grievance at the way in which his earlier enquiries had been dealt with.

The Request

6. In effect the first formal written request made by Mr Slann took the form of a fax addressed to Mr John Newcombe of the FSA's information access team dated 28 January 2005 in which he stated:

"I would like the monthly mortgage rates that you provide to the Statistics Office which form the basis of the calculation for mortgage interest relief for the year beginning 1/10/03. This is all well documented, if you take the trouble to read the file."

Mr Slann received a written reply from a Mr James De Ciacco in which the following passage appears, namely:

"The monthly mortgage rate that the FSA provides to the Office for National Statistics (ONS) is the weighted average of the largest 23 building societies' "basic rate", defined as being the standard ("headline") rate applying to the majority of accounts. These societies' total assets represent over 95% of the building society industry".

The letter then listed the 23 societies involved (many of which are well known household names) and the letter then proceeded as follows, namely:

"As the list is only comprised of building societies it does not include any of the mortgage lenders that left the building society's sector in the past decade. This includes Halifax (which is now part of the HBOS Group) and which moved to the banking sector in 1997.

The weighted average is calculated by using the mortgage balances and interest rates for each individual society. This data is published by the ONS in table 7.1L of Financial Statistics (a rate for the banking sector and a combined rate for banks and building societies are also published). The figures for the period requested are as follows (% per annum)."

The letter then sets out various figures ranging from about 5.05 to about 6.15 and covering a period running from October 2003 to September 2004. The letter finally adding that the Department for Works and Pensions (DWP) had responsibility for policy issues relating to the use of this data with the purpose of Income Support. The letter then ended by suggesting that Mr Slann contact them if he so wished.

7. A subsequent letter again sent by Mr De Ciacco dated 21 February 2005 sent to Mr Slann then explained how the weighted average rate was calculated. There is no need to quote from this letter save to say that it stressed that the calculation of the weighted average rate reflected the

division of the appropriate residential related mortgage balance of any given building society by the society's own mortgage basic rate so as to give a notional interest rate, a worked example being set out in the letter. More importantly for present purposes, however, the letter then referred to section 44 of the Freedom of Information Act (the 2000 Act) and to section 348 of the Financial Services and Markets Act 2000 (FSMA).

8. It is perhaps convenient to set out these sections in full at this stage since further reference will be made to them below. The former section provides in relevant part as follows:

"(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 … ".

Section 348 of the FSMA provides as follows:-

"(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".

Subsection 5 then confirms that the FSA are a "primary recipient" for the purposes of subsection (1).

9. Section 349 of the FSMA need not be set out in full but provides that section 348 does not prevent disclosure of confidential information which is "made for the purpose of facilitating the carrying out of a public function" (subsection (1)(a)) and which is by virtue of subsection (1)(b) permitted by regulations. Subsection (2) then provides that the regulations may in particular make provision permitting disclosure of a prescribed kind and subsection (4) confirms that in relation to confidential information both the "primary recipient" and "a person obtaining the information directly or indirectly from a primary recipient" both constitute recipients for the purposes of the receipt of such information.

These regulations are for present purposes The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001 No. 2188) (the 2001 Regulations). Regulation 3 of those Regulations provides that:

"(1) A disclosure of confidential information is permitted when it is made to any person -

(a) by the Authority or an Authority worker for the purposes of enabling or assisting the person making the disclosure to

discharge any public functions of the authority or (if different) of the Authority worker .....".

"Public functions" includes according to section 349(5)(a) "functions conferred by or in accordance with any provision contained in any enactment or subordinate legislation".

10. In his letter of 21 February 2005 Mr De Ciacco added that the individual interest rates for all residential mortgage lenders being both banks and building societies were published and publicly available in financial publications such as Moneyfacts; the data in question also being available directly from the societies themselves or possibly their websites.

11. Mr Slann then responded by letter dated 23 February 2005 again stating that he needed to see for each society on a month by month basis "what rate you have used on the mortgage balance and your calculations to arrive at the weighted average". He also asked why banks, which for present purposes meant the Halifax, were excluded from the calculation.

12. The FSA sent a substantive reply to Mr Slann's letter of 23 February 2005 by a letter dated 6 April 2005. This letter was signed by a Mr Philip Robinson the FSA's information protection officer. Mr Robinson referred to the fact that the mortgage balances were provided to the FSA "in the returns which [the building societies] are required to complete by the FSA for the purposes of the FSA's protection and regulation of societies." As a result he added that the information and the returns were subject to the prohibition prescribed by section 348 of the FSMA which thereby attracted the operation of section 44 of the 2000 Act. He therefore confirmed the information was "absolutely exempt" adding that as far as the FSA was aware "the monthly balances are not available from any other source nor are they published". He enclosed a document entitled "The Protection of Regulatory Information under English Law" referring again to the way in which in particular section 348 operated and he also confirmed what had been said before, namely that whilst the basic interest rates were included in the confidential supervisory returns, they were also publicly available, e.g. on Moneyfacts as stated in the FSA's earlier letter. He then dealt with the question of the Halifax and reiterated that the figures provided to the ONS for subsequent publication in the table known a Table 7.1L of Financial Statistics represented a building society rate

and not a rate representing the inclusion of banks. For that reason the Halifax was not included since being under the umbrella of HBOS it did not constitute a building society for those purposes. He then informed Mr Slann that with effect from the end of December 2004 the DWP no longer used the average building society rate to calculate income support payments. To that extent at least, as indicated above, this Appeal deals with an historic matter but as shall be explained below the fact that the information could in some ways be said to be stale does not detract from the issues which the Tribunal has to consider stemming from the possible application of section 44 of the 2000 Act.

13. By 23 June 2005 Mr Slann had complained to the IC. The IC acting by a Ms Jo Pedder wrote to Mr Robinson of the FSA by a letter dated 23 June 2005. Ms Pedder's letter in effect asked for confirmation whether the information requested by Mr Slann was the monthly mortgage rate, i.e. the weighted rate specified by Mr Slann in his fax of 28 January 2005 or the monthly balances constituting confidential information caught by section 348 in particular subsection (2) of the FSMA. Ms Pedder sent a letter in similar terms to Mr Slann bearing the same date.

14. By letter dated 19 July 2005 the FSA sent a lengthy reply to the IC. The letter was signed by Mr D Choyce, Chief Counsel to the FSA. For present purposes the main points can be said to be the following, namely:

(i) building societies were required to complete periodic returns to the FSA which the FSA used for its regulatory purposes; they were required to complete the returns by reason of Rules 16.6.16 and 17 in what was called the Supervision Manual in the FSA's Handbook of rules and guidance made under the FSMA;

(ii) on account of the matters set out in (i), the information in question, which comprised the relevant monthly balances, constituted "confidential" information for the purposes of section 348 of the FSMA since:

(a) it related to the "business or other affairs" of the society in question;

(b) it was received by the FSA as a "primary recipient" for the purposes of the FSA's monitoring functions, particular reliance being placed for this purpose on paragraph 6(1) of Schedule 1 to the FSMA which as will be explained below sets out the "functions" conferred on the FSA by section 1 of the FSMA paragraph 6(1) (under the title "Monitoring and Enforcement") providing that:

"The Authority must maintain arrangements designed to enable it to determine whether persons on whom requirements are imposed by or under this Act are complying with them.";

(c) the FSA had not asked for the various societies' consents "partly because of the number involved (23) and partly because Mr Slann could ask them": in anticipation of matters dealt with below, it is to be noted that in due course the FSA maintained, and the IC duly confirmed, that had the consents of all 23 societies been sought, the FSA believed that in the light of the nature of the requests in question no such consents would have been forthcoming;

(d) the information in question, i.e. monthly balances was not to the FSA's knowledge issued elsewhere;

(e) none of the exceptions set out in section 348 of the FSMA would here allow disclosure of the information, i.e. consent or by virtue of section 348(4) by being made available in summary form or in a form which respected the societies' anonymity nor would any of the other statutory gateways, particularly those described by the regulations referred to in section 349, i.e. the 2001 Regulations, would allow the FSA to disclose the information in order to assist it in discharging any of its so called "public functions": public functions are defined by section 349(5)(a) as functions "conferred" on the FSA, a clear reflection of the terms of section 1 of the FSMA which states in bald terms that the FSA is to have the "functions conferred on it by or under this" Act (section 1(1) FSMA);

(f) with regard to the 2001 Regulations and Regulation 3(i) Mr Choyce in his letter stated as follows, namely

> "We doubt whether this gateway would have been available to allow disclosure pursuant to section 1 FOIA. This is because section 349(5)(a) is directed to powers conferred on the FSA by other legislation, not to other legislation to which persons generally, including the FSA, are subject. In any event section 44(1) [of the 2000 Act] makes it clear that disclosure under the Act is to be ignored for this purpose. It follows that the question to be asked is whether we could properly disclose confidential information to a member of the public ignoring a request under [the 2000 Act]. We have not identified any provision in FSMA or the Regulations which would allow this"; and

(g) the letter ended for present purposes with the reiteration of the fact that the information that the FSA received for present purposes being the monthly mortgage balances was received information and therefore caught by section 348 and were the FSA to release the "notional interest" figure, Mr Slann or anybody else could easily re-establish the "mortgage balance" by reversing the relevant calculation, a fact which was made clear in the earlier letter of the FSA of 21 February 2005 referred to above.

15. Ms Pedder for the IC replied to the FSA by a letter dated 1 August 2005. She stated that the IC was "satisfied that the mortgage balance information [was] likely to be exempt under section 44(1)(a) of the [2000 Act] …" but noted that though consent had not been requested it was the FSA's responsibility to consult third parties when a request was received for information which relates to them or is likely to affect their interest". She then made reference to Part IV of the 2000 Act's section 45 Code of Practice and reference will be made to this issue in further detail below.

16. The initial answer to the question of why the FSA believed that consent would not be forthcoming was provided by the FSA's letter of 16 August 2005 addressed to the IC in the following terms, namely:

"… the population used to compile the basis [sic] rate published in Table 7.1L of Financial Statistics involves the largest 23 building societies. If one of these societies withheld consent, the population would be incomplete and the production of an accurate figure would not be achievable. This is as a result of the published rate being the weighted average. The margin of difference would be clearly different from the correct figure should one firm even object to the figures being released. As such, the consent of only some societies would be unlikely to assist the requestor, as he appears to wish to receive the full set of figures. On a final note, FSA have consulted firms in other cases relating to the release of regulatory information, and most are not prepared to do so. As you have stated, Part IV of the section 45 code of practice recognises that public authorities will sometimes need to consult with third parties in order to determine whether or not an exemption applies to information requested under the Act. It is for the above reasons, that the FSA did not feel it necessary, in this case, to consult the building societies involved".

The Decision Notice

17. The IC's decision notice is dated 26 September 2005. The Notice deals with three issues which have been referred to above, namely Mr Slann's allegation that the FSA had failed to provide proof that HBOS was excluded from the calculations and the secondly the alleged failure to provide individual interest rates for each society and finally the alleged failure to provide mortgage balances as well as the calculations used to draw up the weighted average. The only live issue for the purposes of the present appeal is the third but the Tribunal notes as to the first two matters that the IC expressed his satisfaction that as to both those issues the relevant information had been disclosed.

18. Equally, as to the third issue the IC stated that he was satisfied that the FSA had complied with the 2000 Act on the basis of the prohibition against disclosure set out in section 348 of the FSMA. In the accompanying Statement of Reasons being annex 1 to the Decision Notice the IC set out the terms of section 348 adding that its provisions necessarily engaged the operation of section 44(1)(a) of the 2000 Act. He referred to the question of consent noting that the FSA had advised the IC that consent had not been sought for the following reasons, namely:

(i) the release of mortgage balances would enable third parties to calculate whether a society's loan book was "growing or stagnating and in the absence of knowledge about the society's business strategy to draw inappropriate conclusions about these developments", so that in the light of that observation the FSA was "satisfied" that the societies would have been unlikely to agree to the disclosure, with the result that IC duly accepted that this was a valid argument;

(ii) the FSA had informed the IC that it, the FSA, had previously consulted with societies in other cases relating to the release of regulatory information and most societies were "not prepared for the information to be disclosed";

(iii) the FSA had contended that it was "not necessary to approach each of the societies to try to obtain their agreement to the disclosure of the information" a fact which the IC accepted;

(iv) the FSA had also had regard to the requirements of the Appellant who had, of course, requested a full set of figures from all 23 societies from which it followed that unless the 23 societies in question agreed to the disclosure it would not be possible to ascertain an accurate figure, a fact which the IC also accepted;

(v) the information sought was not in the public domain and therefore fell outside section 348(4) of the FSMA; and

(vi) the Appellant had requested an explanation of how the weighted average was calculated and, the FSA having explained the calculation, he had been provided with the said information, namely the manner in which the weighted average was so calculated subject to the fact that were the relevant interest rates figure for each society disclosed the Appellant could simply reverse the calculations and by dividing those figures by the individual rates could work out the separate mortgage balance.

Pausing here, the Tribunal notes that in its Decision Notice, the IC makes no mention of the fact that the information is, as noted above in paragraph 12, stale. In the Tribunal's view, this was entirely understandable since the age

of the information sought can bear no relation to the engagement of section 44(1)(a) of the 2000 Act.

19. Mr Slann's Notice of Appeal is dated 9 October 2005. The Tribunal intends no discourtesy to the Appellant by saying that much of the contents of his grounds of appeal, which cover two pages, do not address the matters which form the basis of the IC's Decision Notice. The only sections which come remotely close to so doing are on page 3 and read as follows:-

> "4. All of the comments under Section 348 of the FSMA are totally irrelevant since the Mortgage lenders obviously put the information requested into the public domain and it is therefore not confidential and para (4) applies.
>
> 5. The assertion that the FSA had previously consulted with the societies in other cases relating to the release of Regulatory information is impossible. I made my request on 7/1/05 under the new legislation having pressed all of the previous year for the same information. They did not have time to handle any other request for this data before compiling an excuse to get rid of me. Where is the proof?
>
> ...
>
> 6. The claim that market share might embarrass those lenders losing value is totally unsubstantiated and when you think of the retail market or quoted companies, we are constantly bombarded with sales information. In any event the details that I want are now over 2 years old and of no commercial relevance".

20. Apart from Mr Slann's continued assertion that the information he was seeking, namely the mortgage monthly balances was in some way publicly available, he was in effect taking issue with the IC's expression of satisfaction with the FSA's view that disclosure to consent would not be forthcoming for the reasons set out in sub paragraph (ii) of paragraph 18 of this judgment.

21. The IC issued a formal reply dated 8 November 2005. This Reply covers much of the history already set out earlier in this judgment and for present purposes reiterated the matters set out in paragraph 18.

Events Since 8 November 2005

22. Since the date of the IC's Reply there have been further exchanges many of them emanating from the Appellant. The Tribunal feels that the greater part of Mr Slann's correspondence with the IC simply repeats arguments which he had rehearsed prior to and up to the time of the IC's Reply. However, out of courtesy to his position as a litigant in person, it is fair to point out that there is perhaps one additional matter to which he draws attention in the subsequent exchanges. In his letter of 10 November 2005 addressed to the IC's office he refers to what he calls "a copy of the schedule of Mortgage Details referred to as Table MM10". However, this table, which he appends to his letter, simply refers to gross yearly mortgage lending coupled with an estimated market share attributable to 30 specified societies expressed in terms of percentage. The table in question has been compiled by the Council of Mortgage Lenders a fact drawn attention to by a subsequent reply sent by the IC dated 25 November 2005.

Evidence

23. The Tribunal had the benefit of a number of written statements including one from Mr Slann, another one from Ms Pedder of the IC's office dated 3 February 2006 and 2 from Mr Reginald Clarke of the FSA. It is not proposed to say anything about these matters other than Mr Clarke's statement since he was the only person cross examined at the appeal.

24. Mr Clarke is an Associate of the Regulatory Reporting and Data Analysis Team at the FSA. He has spent 30 years involved with the prudential supervision of regulated firms of which the last 14 years have been related to what he calls in his first statement at paragraph 1 "the area of collecting, processing and analysing financial data from building societies".

25. He refers to section 2 of the FSMA and for completeness it is perhaps useful to set out the relevant terms for present purposes, namely:

> "(1) In discharging its general functions the Authority must, so far as is reasonably possible, act in a way -
>
> (a) which is compatible with the regulatory objectives; and

(b) which the Authority considers most appropriate for the purpose of meeting those objectives.

(2) The regulatory objectives are -

(a) market confidence;

(b) public awareness;

(c) the protection of consumers; and

(d) the reduction of financial crime".

He adds later in his first witness statement that the FSA has available to it "a range of sanctions available where a regulated firm is in breach of a rule, including the imposition of a financial penalty or even the removal of authorisation". He goes on to refer to the FSA's Handbook to which reference has already been made and in particular Block 4 which is made up of modules describing the operation of the FSA's authorisation, supervisory and disciplinary functions. He goes on to explain that in order to discharge its supervisory and other functions under the FSMA the FSA needs "timely and accurate information about the firms and other entities which it monitors". A reference to the monitoring function has already been made earlier in this judgment.

26. At paragraph 13 of the same witness statement he refers to SUP 16.7.16 which is the rule which sets out the reporting requirements for building societies. The Tribunal feels that it is not necessary to go further and set out the contents of this rule: it is enough to observe that Mr Clarke confirms that monthly financial reports are required from the largest societies and, as he himself notes at paragraph 13 of his first witness statement, the range of data required, set out in a specimen sheet as exhibited by him, clearly indicates that data which he calls "commercial sensitive information" is obtained from the societies, e.g. the amounts of their loans and the amounts of any new mortgage approvals. Pausing here, this reflects the determination of the IC in its Decision Notice already referred to that given the FSA's contentions the building societies would be highly unlikely, if not totally reluctant, to the divulging of such information.

27. At paragraph 14 Mr Clarke confirms the point already touched on and which forms part of the overall complaint by the Appellant, namely whether the monthly total values of mortgage loans made by a society are available elsewhere. Mr Clarke states that this information is not available to the FSA from any other source and maintains that it is not published either by the FSA or by the societies themselves. It is therefore treated by the FSA as confidential information. He adds that a key feature of the data collection process is that the regulator must maintain the confidence of the firms it regulates that commercially sensitive data provided to the FSA will not be disclosed to third parties, adding that inappropriate disclosure could have the effect that firms would become more guarded and less willing to volunteer information to the regulator.

28. The remainder of Mr Clarke's first witness statement is taken up with a description of how Income Support was based on the average rates from building societies presented as the "basic (or standard variable) mortgage rate" by the ONS. He also notes that until January 2005 this rate found published expression in the table called Table 7.1L, and was used by the DWP to calculate such Support. However, he points out that from January 2005 the DWP has used Bank of England rates in order to calculate the necessary Income Support figure. Finally, he confirms that the table referred to by Mr Slann, namely Table MM10 differs in many material respects with the information formulated by the FSA to the ONS, not least because the data contained therein represents annual as distinct from monthly estimated data.

29. Mr Clarke's second witness statement in effect refutes a suggestion made previously in writing by Mr Slann that the DWP in some way "instructed" the FSA to compile the relevant data. It then revisits the FSA's contention that the information which it collects from building societies is in effect utilised for the purposes of functions which he has overall characterised as "regulatory". In paragraph 9 of his second witness statement Mr Clarke refers to what he calls the Threshold Conditions which need to be complied with by building societies in order to remain authorised to accept deposits from the public. These are set out in Schedule 6 to the FSMA. He refers in particular to paragraph 4 which deals with the need for building societies as "the person concerned" to maintain what are called "adequate resources … in relation to the regulated activities [it] seeks to carry on, or carries on."

30. Mr Clarke further states at paragraph 10 that the consequence of such events is that any "unusual increase" in the societies' mortgage funds might cause the FSA in certain circumstances to "follow the matter up with the building society concerned". Mr Slann in his cross examination of Mr Clarke took issue with the likelihood of this occurrence if not the entire question of how genuine the FSA's monitoring interests were. The Tribunal does not feel that any of the questions put by Mr Slann to Mr Clarke in any way could be said to have been directed to the principal issues on the appeal consisting as they did largely of an attack upon Mr Clarke's experience and even going into asking Mr Clarke about matters which concerned the internal workings of building societies as distinct from those of the FSA. On his own admission Mr Slann said that much of his cross examination was designed to show that the mortgage interest rate had little, if any, relevance to the regulatory process, such as it was, but as is clear from the judgment so far this is not an issue which formed the basis of the Decision Notice issued by the IC.

Powers of the Tribunal

31. Under section 58 of the 2000 Act it is provided that if on an appeal against a Decision Notice the Tribunal considers that the Notice is not in accordance with the law or to the extent that the Notice involved an exercise of discretion by the IC he ought to have exercised his discretion differently, then the Tribunal shall allow the appeal or substitute such other order as could have been issued by the IC: in all other cases the Tribunal shall dismiss the Appeal.

32. There is in the instant appeal no question of discretion. The sole question is whether the IC correctly applied section 44 of the 2000 Act. More particularly the question of law which the IC faced was whether section 348 of the FSMA did constitute an enactment which "prohibited" disclosure of the information sought within the meaning of section 44.

33. In an attempt to distil the pertinent arguments from the range of matters which were canvassed before the Tribunal by Mr Slann, the only conceivable counter argument must necessarily address the question of whether on the facts of this case the prohibition was absolute.

34. As shown in paragraph 8 above section 348 of the FSMA provides that "confidential" information must not be disclosed by a "primary recipient". For present purposes it is clear, and the Tribunal accepts, that the "primary recipient" is the FSA. In addition section 348 makes it clear that "confidential" information must not be disclosed by any person obtaining information directly or indirectly from a primary recipient subject to two exceptions which are first consent by the person from whom the information is received or if different the person to whom the information relates. In the present case, the only persons capable of giving such consent are the 23 building societies who feature in the FSA's calculations.

35. As for consent, the IC sets out in its decision notice those matters relayed to him by the FSA which the FSA claim justified its view and belief that consent would not have been forthcoming such as the fact that the information concerned was commercially sensitive information and also notably because the appellant himself could have sought such a request himself.

36. The short answer which in the Tribunal's view fully justified the IC in his findings in the decision notice in this respect that non disclosure was to be upheld is quite simple. Failure to obtain consent necessarily engaged the prohibition in section 341(1) of the FSMA, Indeed had disclosure been made the same would clearly have been unlawful as well as constituting a criminal offence under section 352 of the FSMA. It is impossible to see how there could be any room for the exercise of any discretion by the IC in such a case. However, even if there were, as to which the Tribunal is extremely doubtful, as there appears to be no legal basis to entertain a challenge to the exercise of any discretion, the Tribunal finds that the IC was entirely warranted in accepting the reasons advanced by the FSA as to why it was considered that consent to the nature required, i.e. as to all 23 building societies, would not have been forthcoming.

37. The next relevant exception arises by virtue of the 2001 Regulations which are referred to above at para 9. As reflected in the correspondence which has been referred to again the only situations in which the information which is otherwise confidential can be disclosed can only be via or by virtue of what are called the various "gateways" prescribed by the Regulations. It is perhaps important to revisit these Regulations. Regulation 3(1)(a) allows the FSA to disclose confidential information to assist it in discharging any "public

function". Section 349(5)(a) defines such functions as being "conferred" on the FSA by or in accordance with in effect provisions set out in either statutory or statutory instrument form.

38. The Tribunal respectfully agrees with the FSA when it contends that section 349(5)(a) with its reference to public function is referring to and is directed to functions and powers conferred on the FSA by statute or by statutory instrument other than the FSMA and not legislation such as the 2000 Act to which other persons including the FSA are or might be subject. Even if that view were wrong, section 44 on its face makes it clear beyond doubt that disclosure under the 2000 Act is to be ignored for this purpose by virtue of the dispensing words "otherwise than under this Act".

39. Two additional but related arguments concerning the possible absence of any confidentiality stem from the provisions of section 348(4) of the FSMA. The first concerns a matter touched on several times already in this judgment, namely what can be called public availability. The second concerns the fact or possibility that the information requested could be put in a summary form or in a form so framed that sufficient anonymity is attached: see section 348(4)(b) FSMA. The first argument attracts an easy answer. The Tribunal was provided with no evidence whatsoever that the particular information sought by the Appellant was in the public domain. Enough has been said already about the information emanating from the Council of Mortgage Lenders put forward by Mr Slann to show that such information nowhere reflected the monthly data which Mr Slann was at all times seeking. Moreover, had the information sought been available, the information would have constituted exempt information by virtue of the provisions of section 21 of the 2000 Act which renders exempt information which is said to be "reasonably accessible" to an applicant "otherwise than under section 1".

40. As to the second issue, it is perhaps not too simplistic to say that an anonymous redaction of the information requested would inevitably have altered its essential nature and content. A list of information drawn from a smaller number than the 23 building societies in question could or would have distorted the calculations contained in the data transmitted to the ONS. As for the data being presented in an anonymous form, the Tribunal accepts that this would have entailed either the risk of an informed reader attributing certain balances to certain societies given their relative sizes and activities, or

at the risk of the FSA, altering the data to preserve anonymity thereby in effect creating new data or information not constituting information properly forming the subject matter of section 1 of the 2000 Act, although the Tribunal accepts equally that there may be some scope for debate about such a view. However, it is not an issue which the Tribunal feels is necessary to resolve in order for the appeal to be determined.

Code of Practice

41. Apart from the above matters, reference was made both prior to and during the appeal to the scope and operation as far as the present matters were concerned of section 45(1) of the 2000 Act. This provides that the Secretary of State for Constitutional Affairs shall issue and may from time to time issue a Code of Practice providing guidance to public authorities as to the practice which it would in his opinion be desirable for them to follow in connection with functions under Part I of the 2000 Act. Section 45(2) provides that the Codes of Practice must in particular include provisions relating to "(a) Provision of advice and assistance by public authorities to persons who propose to make, or have made requests for information …".

42. Mr Slann in effect alleges that the FSA has failed to ask building societies for permission to disclose the information which they have provided in confidence. The terms of the Code can be found on the Department of Constitutional Affairs' website in relation to the 2000 Act matters and is said, according to paragraph 4 of the Foreword, to "[facilitate] the disclosure of information under the [2000] Act by setting out good administrative practice that it is desirable for public authorities to follow when handling requests for information including where appropriate the transfer of a request to a different authority". Part IV deals generally with consultation with parties other than an applicant in the public authority. Such may be the case for example where the public authority has to consider whether a qualified exemption applies and prior to the consideration of the balance test which has to be applied as to whether certain public interests are or are not engaged. The Tribunal confirms that in the circumstances of this case where an absolute exemption is engaged on the basis of a clear legislative prohibition, there is no room for the Code of Practice in which to operate. In any event, the Code of Practice does not have the force of law. The Code on its face does not address such a prohibition but Part I, Section 1 confirms that the Code is designed to

provide guidance to public authorities as to the "practice" which it would, in the opinion of the Secretary of State … be desirable for them to follow in connection with the discharge of their functions under Part I … of the [2000 Act]".

43. A related issue was raised in the interval following the Decision Notice and then revisited at the hearing of the Appeal being the impact of section 16 of the 2000 Act which deals with the so called "Duty to provide advice and assistance" in the following terms, namely:

> "(1) It should be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.
>
> (2) Any public authority which, in relation to the provision of advice and assistance in any case, confirms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

44. Counsel for the IC and for the FSA differed as to way in which section 16 should be interpreted. The former contended that there was invariably a duty upon a public authority even in a case such as the present where a total prohibition was involved to provide advice and assistance but there would be cases where it would not be reasonable to do so, such as the present one. Counsel for the FSA on the other hand disputed any contention that by virtue of section 16 there was any overriding duty to provide advice as well as assistance in a case such as the present where there had been a total absence of consent thus engaging the absolute prohibition stipulated by section 348 of the FSMA.

45. Although the Tribunal recognises the force of the FSA's contentions it recognises equally that the wording of this section does not proscribe the range of matters as to which advice and/or assistance should be sought. However, whichever of the competing arguments are applied the result in the present case remains the same and the Tribunal therefore bases its decision upon the narrow ground stipulated by the IC in his Decision Notice, namely

that by virtue of the absolute prohibition arising in this case under section 348 of the FSMA disclosure was prohibited.

46. In the circumstances the Appeal is dismissed.

Signed Date 6 July 2006

David Marks
Deputy Chairman

EA/2005/0019