

**FOIA s.43(2)** – Qualified exemption: commercial interests/trade secrets

**FOIA s.44(1)** – Absolute exemption: prohibitions on disclosure

## ***Anthony Craven v IC***

**EA/2008/0002**

**13<sup>th</sup> May 2008**

### **Cases:**

### **Facts**

The Appellant requested from the Financial Services Authority (FSA) a draft FIMBRA report on the sale of home income plans by West Bromwich Building Society. The FSA had succeeded to FIMBRA's functions. The FSA admitted that they held the document but refused to disclose it, relying on FOIA s.43 and s.44. The prohibitory enactment relied on for the purpose of s44 was the Financial Services and Markets Act 2000 ("FSMA") s.348. This provided 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 related, unless the information had already been lawfully made available to the public. The Building Society had been contacted by the FSA but had refused to consent to the disclosure.

The IC was given confidential access to the draft report. 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 s.44, 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. In his view the *opinions* constituted information protected by s.43 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 the Appellant's request in accordance with FOIA, and that no part of the draft report should be disclosed.

### **Findings**

The Appellant argued that part of the report was already in the public domain as it had been leaked, therefore the remainder of the information (the 'unrevealed information') should be disclosed as well.

### **The Unrevealed Background Information**

The Tribunal considered whether the unrevealed background information in the draft report was protected from disclosure by s.44 FOIA on account of the prohibition in s.348 FSMA. The Tribunal considered the effect of s.348(4), which provides that information is not subject to the ban on disclosure if it has already been made

available to the public without breaching s.348 (which can occur in a variety of ways permitted by s.349, often referred to as ‘gateways’). They held that s.348(4) could not apply in this case as the unrevealed background information was not lawfully made available to the public. They rejected the Appellant’s argument that the leak was effectively a gateway because the information became public as a result. The leak was itself in contravention of s.348. They therefore concluded that unrevealed background information was protected by the s.44 exemption.

### The Unrevealed Opinions

The Tribunal considered the application of s.43. The Tribunal rejected the Appellant’s argument that the Society was not deserving of protection because of the nature of Society’s conduct and its effects on pensioners, as the relevant question for the Tribunal was not whether the Society deserved protection, but simply whether there was a sufficient likelihood of prejudice within the meaning of s.43.

The Tribunal considered the IC’s arguments that release would seriously damage the Society’s commercial interests in that it might generate negative publicity, 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. The Tribunal also considered the Appellant’s arguments 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.

The Tribunal held that there would be a likelihood of prejudice to the commercial interests of the Society if the unrevealed opinions were disclosed under FOIA. The opinions were critical of the Society and were expressed in strong terms. Despite the severe damage already done to the reputation of the Society by the judgment of the High Court in *Investors Compensation Scheme Limited v West Bromwich Building Society* 15 January 1999, they were unable to take the view that the Society had no reputation at all to protect or that it could not be damaged any further. They therefore found that the s.43 exemption applied.

The Tribunal went on to consider where the balance of public interest lay. They considered the following factors in favour of disclosure:

- (1) The subject matter of the draft report – home income plans – was a matter of real public interest.
- (2) There was a value in openness about what went wrong with the sale of such plans. This might assist recompense, educate consumers, and reduce such problems in the future.
- (3) Since much that was in the draft report was already in the public domain, the interference with the privacy of the Society’s business affairs was relatively limited.
- (4) The events considered in the draft report took place many years ago.
- (5) The events considered in the draft report still had continuing effects.

The Tribunal considered the following factors in favour of maintaining the exemption:

- (6) The prospect of harm to the legitimate interests of the Society and its current investors.
- (7) The fact that the report was an unvalidated and incomplete first draft.
- (8) The fact that the unrevealed opinions on their own, in the absence of the background information which was 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, so that there was a limited public interest in revealing the remainder of the matters.
- (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.

The Tribunal held that the factors favouring the maintenance of the exemption, especially (7), (8) and (9), strongly outweighed the factors in favour of disclosure.

### **Conclusion**

The Tribunal upheld the Decision Notice and dismissed the appeal.