



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

Freedom of Information Act

The Financial Services and Markets Act 2000 and the Freedom of Information Act 2000

The Freedom of Information Act 2000 (FOIA) gives a right of public access to information held by public authorities. This is part of a series of guidance notes to help public authorities understand their obligations and to promote good practice.

This guidance explains to public authorities who hold information which is subject to the [Financial Services and Markets Act 2000 \(FSMA\)](#) why section 348 of the FSMA is a bar to disclosure under the FOIA and also clarifies the meaning of some key terms.

Overview

- Section 44 of the FOIA provides an exemption for information which is prohibited from disclosure under other legislation.
- Section 348 of the FSMA can prevent the disclosure of confidential information by a "primary recipient" (which includes the FSA and Secretary of State), or if it is obtained from a "primary recipient".
- The disclosure of confidential information is allowed under the FSMA if it is for the performance of a "public function"; however complying with an FOIA request is not regarded as a "public function".

What does the FOIA say?

Section 44 says that you don't need to disclose information in response to a request if its disclosure, other than under the FOIA:

- is prohibited by any enactment;
- is incompatible with any Community obligation; or
- would be a contempt of court.

You also do not need to confirm or deny whether you hold the information if that confirmation or denial would fall within any of the above subsections. This exemption doesn't require the consideration of a public interest test.

Please see our guidance [Prohibitions on disclosure: awareness guidance No. 27](#) for further information.

What does the FSMA say?

Section 348 of the FSMA explains that confidential information must not be disclosed by you if:

- you are a "primary recipient", or

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- you obtained the information directly or indirectly from a primary recipient,

unless consent has been obtained from:

- the person who gave the primary recipient the information; and
- if different, the person which the information is about.

A person who breaches section 348 is committing a criminal offence.

Primary recipient

The FSMA defines a primary recipient as:

- the Financial Services Authority (FSA);
- the Secretary of State;

or any person who is or has been employed by any of the above; or any auditor or expert instructed by any of the above; or

- a person appointed by the FSA to make a report under section 166 of the FSMA – reports by skilled persons.

Confidential information

The FSMA defines confidential information as information which:

- relates to the business or other affairs of any person; and
- was received by the primary recipient for the purposes of any functions of –
 - the FSA or
 - the Secretary of State under any provision made under the FSMA.

and has not:

- already been made available to the public without breaching the section 348 of the FSMA; or
- been anonymised.

The FSMA Regulations

Confidential information can be disclosed by a primary recipient in certain circumstances which are set out in the [Financial Services and Markets Act 2000 \(Disclosure of Confidential Information\) Regulations 2001](#) .

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The regulations state that confidential information can be disclosed by a primary recipient (or any person who obtained the information directly or indirectly from a primary recipient) for the purposes of:

- Criminal proceedings and investigations.
- Complying with Community obligations.

This list is not exhaustive and the remaining regulations which permit the disclosure of confidential information can be found within the FSMA regulations.

When does section 348 of the FSMA not apply?

The disclosure of confidential information is allowed (as set out in section 349 of the FSMA) if it is:

- made for the purpose of allowing the performance of a public function; and
- allowed by the FSMA regulations (as described in the previous section of this guidance).

Section 348 of the FSMA also does not apply to:

- “Revenue information” which is information held by a person which it would be an offence under section 182 of the Finance Act 1989 for them to disclose.
- “Competition information” which is information that-
 - relates to the affairs of a particular individual or body;
 - is not otherwise in the public domain; and
 - was obtained under or by virtue of a competition provision (as defined by section 351(6) of the FSMA).

Performance of a public function

The term “public function” includes functions given by any enactment. The Information Tribunal has confirmed however that complying with your duties under the FOIA can’t be considered as the performance of a public function.

Example: In [Rowland v Financial Services Authority and Information Commissioner \(EA/2008/0075 and 0077; 3 April 2009\)](#), Mr Rowland argued that it was wrong for the FSA to rely upon the section 44 of the FOIA exemption by citing section 348 in response to his request. This is because he considered their duty to comply with the FOIA as a performance of a public function, thereby engaging the section 349 exception. However, the Tribunal concluded that “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”.

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More information

This guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunal and courts on freedom of information cases. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information, please contact us.

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