



9th March 2011

Dear Complainant,

**Complaint against the Financial Services Authority (FSA)
Reference Number: GE-L01226**

I write with reference to your correspondence with my office in relation to your further complaint against the Financial Services Authority (FSA).

At this stage, I think it would be worth explaining my role and powers. I am charged, under Paragraph 7 of Schedule 1 of the Financial Services and Markets Act 2000 (the Act), with the task of investigating those complaints made about the way the FSA has itself carried out its own investigation of a complaint that comes within the complaints scheme. The investigations I undertake are conducted under the rules of the Complaints Scheme (Complaints against the FSA - known as COAF). I have no power to enforce any decision or action upon the FSA. My power is limited to setting out my position on a complaint based on its merits and then, if I deem it necessary, I can make recommendations to the FSA. Such recommendations are not binding on the FSA and the FSA is at liberty not to accept them. Full details of Complaint Scheme can be found on the internet at the following website; <http://fsahandbook.info/FSA/html/handbook/COAF>.

Your Complaint

1. You are unhappy that a courier, sent by the FSA, was delivered a package to your neighbour (rather than you) between 10.00 pm and 10.30pm at night. Specifically you feel that the delivery of a package at that time of night is unacceptable particularly as the package, containing sensitive confidential material relating to an ongoing Enforcement investigation, was simply left with your neighbour.

Background

When considering your complaint I should also at this point make reference to the fact that my powers derived as they are, from statute contain certain limitations in the important area of financial compensation. The Act stipulates in Schedule One that the FSA is exempt from "liability in damages". It states:

- "(1) Neither the Authority nor any person who is, or is acting as, a member, officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.*
- (2) (Irrelevant to this issue under investigation)*
- (3) Neither subparagraph (1) nor subparagraph (2) applies*
 - (a) if the act or omission is shown to have been in bad faith; or*

- (b) *so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the [1998 c.42] Human Rights Act 1998.*"

COAF nevertheless then goes on to provide in paragraph 1.5.5 that:

"Remedying a well founded complaint may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex-gratia basis. If the FSA decides not to uphold a complaint, it will give its reasons for doing so to the complainant, and will inform the complainant of his right to ask the Complaints Commissioner to review the FSA's decision."

If I find your complaint justified, it is to that paragraph that I must refer in order to decide any question of a "compensatory payment on an *ex-gratia* basis".

If you were to take the view that Schedule One referred to above was relevant in the context of the Human Rights Act 1998 I should explain that Section 6(1) of that Act that is referred to, provides as follows:

"It is unlawful for a public authority to act in a way which is incompatible with a Convention right".

The only Convention rights that I consider may be relevant are contained in Article 8 of the Convention and Article 1 of the First Protocol to the Convention both of which are set out in the Human Rights Act of 1998.

Article 8 of the Convention states:

1. *"Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Article 1 of the First Protocol provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

In the context of Article 8 of the Convention, while it might be considered that the FSA failed by its actions to respect your private and family life by attempting to make a delivery at an hour which many might consider unreasonable, I do not find that a delivery made between 10.00 and 10.30 pm was sufficiently late or intrusive enough, despite that hour, to amount to a "lack of respect for your private or family life" particularly as the package was delivered to your neighbour. Nevertheless a delivery of confidential material being made after 10.00 pm is unsatisfactory and comes close in my judgement to crossing the line set by Article 8. In the context of Article 1 of the First Protocol there is clearly no breach of the provisions of that Article that is relevant to your complaint.

My Position

I have now had the opportunity to consider the issues you have raised and to review the FSA's investigation files in relation to your complaint. Following an examination of its investigation files I also asked the FSA to provide me with some additional information surrounding its decision to send packages to you (and a number of other individuals) on the evening of 31st August 2010.

Having read the FSA's file it is not disputed that the FSA dispatched a package to you on the evening of 31st August 2010. I have asked the FSA to comment upon why it felt that it was necessary to send the packages that evening. The FSA, in its response to me stated:

"The documents sent to [you] were extensive (approximately 5,000 pages) and in accordance with its usual practice the FSA asked for [you] to provide comments on the documents within 28 days of receipt. In the interest of fairness Enforcement thought it appropriate that [you] should have both soft and hard copies on the same day so that there were no obstacles to [you] beginning [your] review of that material. Because the documents are extensive it took a full day for the FSA to compile them and dispatch them to [you]. [Your] documents had to be sent at the same time as those sent to the other individuals under investigation and so there was more than one bundle of documents which the FSA was preparing for dispatch on the same day. This is why the documents were not ready prior to 18.13pm (sic) when they were ready for dispatch. It was not possible to email [you] all of the documentation sent via the courier due to the volume. This was why hard copies were sent (on CDs) to ensure that [you] had all of the relevant documentation".

In subsequent correspondence, the FSA confirmed that the "FSA sent the PIR [its Preliminary Investigation Report] to [you] on 31st August 2010 because [it] wanted [you] to have a full 28 days to respond to the document and it was the latest [it] could send it bearing in mind the time limits contained in section 66(4) of the Financial Services and Markets Act 2000".

Despite making these comments during my initial investigations, in its response to my Preliminary Decision, the FSA advanced a different argument whereby it indicated that, although its usual procedures are to give respondents 28 days to respond to a PIR, the Act places no requirement upon the FSA to issue respondents with a PIR and instead the FSA can simply issue a warning notice to an individual (although it should be stated that the FSA rarely adopts this approach). Although I am disappointed that the FSA has now provided me with a completely different explanation of its responsibilities under the Act, I would immediately say that I accept the FSA, when completing an investigation, needs only to comply with the terms set out within the Act (which would include any relevant time restrictions).

I also appreciate that in its response to my Preliminary Decision the FSA made the point that the complaint was limited to the late delivery, in terms of the time of night, of sensitive material and that I should keep that in mind in taking into account what I should consider in my investigation. I am afraid however that while I understand that approach by the FSA the peripheral issues that arise in my investigation are worthy of comment by me and indeed do have an overall bearing. They also are issues that if borne in mind can only benefit both the Regulator and the Regulated.

I accept that the FSA did not need to issue you with a PIR. It is clear from the information which the FSA has provided that, no later than 25th August 2010 (when it clarified the address where the supporting documents were to be sent) it had decided that it would do so. Whilst the FSA can therefore leave the issue of a PIR until the last moment, once it decides to issue a PIR, from that point on I believe that the FSA therefore had to comply with not only the requirements placed on it by the Act but also those set out within its own internal procedure guide. As such, once it decided to issue a PIR it should follow its procedures and in doing so allow you 28 days to comment on it.

Given that the FSA was intending to issue its PIR, as is its general practice (although it is not legally bound to do so), to all of those individuals who were the subjects of this investigation, it would have been clear to the FSA that it needed to issue the documents to all of the individuals concerned no later than 31st August 2010. In my opinion, the fact that the Act does not require the FSA to issue a PIR is irrelevant when considering the issue which gave rise to the circumstances of your specific complaint. In this instance the FSA placed itself in a position where, having decided to issue you with a PIR, it had to comply with both the requirements of section 66(4) of the Act and its own internal procedures (i.e. allow you 28 days to respond) which required it to dispatch the documents to you on 31st August 2010. Ultimately, the late delivery of the documents to your home (or in this case to that of your neighbour) was caused by the FSA being unable to dispatch the documents (either in bundles or electronic format on discs) until 6.13 pm on the evening of Tuesday 31st August 2010 (when it booked the courier).

As part of my investigation I also asked the FSA to comment upon whether it paid any regard to the potential time of delivery of the package given that the FSA did not book the courier to deliver the package until 6.13 pm and was not picked up/dispatched until 6.22 pm. In its responses the FSA has confirmed that it did not expect the documents to be delivered late at night and that it was "*not aware when booking the courier that it would not be conveyed immediately from Canary Wharf to [your home] so did not anticipate or expect it to be delivered at an unsociable hour*". The FSA has also confirmed that since 31st August 2010, it has revised its procedures to ensure that documents are not delivered at unsociable hours.

Having considered the above answers put forward by Enforcement, I can understand its reasoning for sending the documents out to you (and the other individuals who were subject to the same Enforcement Investigation) on the evening of 31st August 2010. However, upon further consideration of its answers, I have a number of concerns which I will set out below.

- i. Enforcement did not send an email to you and issue you with its PIR covering letter and inform you that the discs containing the full reports were to be dispatched to him until 4.35 pm on 31st August 2010. Additionally, it is clear that this email did not specify when the documents would be dispatched to you or specifically warn you that the documents would be delivered by courier that evening.
- ii. Enforcement states that the "*documents sent to [the individuals] were extensive (approximately 5,000 pages) and in accordance with its usual practice the FSA asked for [the individuals] to provide comments on the documents within 28 days of receipt*". However, it sent you two discs containing the information which presumably needed to be printed out in order that you could comment upon it.

- iii. Although the FSA booked the courier it does not appear that it specified a latest delivery time. Whilst I accept that it may well have “*expected them to be delivered in good time*” the fact remains that they were in fact not delivered in good time nor in fact were actually delivered to you. The FSA accepts that a delivery after 10.00 pm is unacceptable and has apologised for this.
- iv. The delivery of this type of material should not, in my opinion, have been left with a neighbour. It is clear from the comments the FSA have made to me that it could not delay the issuing of these documents if you were to have the maximum amount of time permitted to consider and respond.

However, given the requirements of Section 66(4) of the Act, I am concerned that the FSA allowed documents to be left with a neighbour with no guarantee that the documents would be passed to you the next morning or indeed in a timely fashion. When considering this point, particularly given the time constraints the FSA has indicated were facing you, one must consider what the effect would have been upon both the FSA and you had your neighbour been taken ill and the package not passed to you until near or after the expiry of the 28 day period the FSA had given you to respond to its PIR. In making this point I accept that your neighbour did pass the package to you the next morning unopened. The fact FSA’s processes continue to allow this situation to develop is of concern to me particularly where the package concerned contains confidential and sensitive documents which are held on unencrypted discs.

- v. The position is that extremely sensitive and confidential information relating to you and your colleagues who are the subject of an Enforcement Investigation was sent by courier on unencrypted discs and left with a neighbour. Whilst it is clear that the package was given to you unopened, the FSA’s actions allowed itself to be placed in a position where the unencrypted discs could have been passed to a third party and the confidential and sensitive information about a potentially high profile case could have been released to the media. I appreciate that the opening of somebody else’s mail can be a criminal offence, however, this would have been of little consequence had the package been opened and the discs passed to the media. I make this point as the FSA’s covering letter that was to you by email at 4.35pm on 31st August 2010 included the very clear warnings and stated:

“Finally, please note that, save where it was provided by Firm A to the FSA, the information contained in the documents and the material appended to them constitute confidential information for the purposes of section 348 of the Financial Services and Markets Act 2000. Disclosure of confidential information is prohibited except in accordance with statutory permissions. For the avoidance of doubt, this does not prevent you from seeking legal advice on the contents of this letter or your response”.

In light of the concerns I have listed above, in my opinion, it remains unclear why the FSA did not issue you with its PIR covering letter until 4.35 pm on 31st August 2010 when it was clear that you would be unable to start to consider the documents physically until at least the next day. I appreciate that the FSA has stated “*in accordance with its usual practice the FSA asked [you] to provide comments on the documents within 28 days of receipt*” and understand that it did this due to the requirements placed upon it by Section 66(4) of the Act.

I fully understand that the investigation the FSA's Enforcement division undertakes are often complex and can be extremely time consuming. I am also aware that, to reflect this, the time the FSA has to complete its investigations under the Act has now been increased from two to three years. However, I believe the FSA, given that it was always apparently intending to issue you with a PIR, should have been aware of the date by when it needed to issue the documents to you. Given that the FSA clarified the address to which the documents should be sent on Wednesday 25th August 2010, it is unclear to me why the FSA was not in the position to send the documents to you until 6.22 pm on Tuesday 31st August 2010.

Whilst delivering the package late in the evening may allow the FSA to comply with its internal procedures, in my opinion, the FSA may not be complying with the reasons why those time limits were put in place. I hold this view as, I do not believe that, it would have been reasonable to expect you to start to print and to review over 5,000 pages of material after 10.00 pm had the courier managed to deliver the package to you or, specifically in your situation, as you did not actually receive the package until the following day.

I accept that the FSA needs to issue documents to individuals who are the subject of an investigation in a timely manner and that if more than one person is under investigation at the same time. However, when dispatching documents to a residential address, I do not believe that the FSA can limit its focus simply to the people who are under investigation but must (my emphasis) also consider the interest of other people who may reside at the relevant address.

In this instance, I can understand, to an extent, why the FSA felt the need to deliver the documents to you that evening. I also accept the FSA's comments that the documents were dispatched to the courier at 6.22 pm and that it "*expected them to be delivered in good time*". However, the fact remains that when instructing the courier, in my opinion, the FSA does not appear to have considered the interests of the other people who reside at your address or indeed the interests of your neighbour to whom the package was delivered. It is also clear from the FSA's file that when arranging for the documents to be collected, the staff from Enforcement were unaware of the different delivery standards which were available and specifically that the same day delivery standard requested would not in fact directly result in the package going directly from Canary Wharf to your address.

Whilst I would not, and do not, necessarily expect the members of the FSA staff concerned to be intimately aware of how the courier delivers packages, I would have expected (particularly given the time the delivery was requested) that the FSA obtained a general idea of the time it was believed the package would be delivered to you before selecting the appropriate delivery service (especially in light of the strict requirements of Section 66(4) of the Act which the FSA has referred to). I would also add that I feel that the position taken by the FSA that it simply expected the delivery to go directly to you, and was unaware that the delivery standard requested would result in the package going to the courier's depot and then out to the delivery address, is not an adequate answer or position for the FSA's Enforcement Division to adopt in this situation.

Had the FSA informed you in advance that a courier would be calling that evening (my emphasis), or specified a latest delivery time to the courier (and this was disregarded by the courier) my view is likely to have been different.

Whilst I am disappointed with the manner in which the FSA acted at the time, I am aware that it has apologised for this and, since the FSA instructed the courier to deliver the package to you, has changed its procedures. Although I welcome this, this is still an area which I feel I must return to and will do so in my recommendations which are shown below.

Conclusion

Although I can understand why the FSA felt it necessary to issue the documents to you on the evening of 31st August 2010, it is clear to me that the FSA did not consider the timings or plan sufficiently in advance to ensure that they were available for dispatch at a reasonable hour. In arriving at my overall decision, I am mindful of the possible outcomes which are available to a successful complaint, and would draw your attention to paragraph 1.5.5 of COAF which states:

COAF 1.5.5 Remediating a well founded complaint may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an *ex-gratia* basis. If the *FSA* decides not to uphold a complaint, it will give its reasons for doing so to the complainant, and will inform the complainant of his right to ask the *Complaints Commissioner* to review the *FSA's* decision.

From the FSA's file it is clear that the FSA accepts that the package was delivered to your neighbour at an unsociable hour and has acted to remedy the situation. To do this, the FSA has changed its procedures (in an attempt to prevent a late delivery occurring in the future) and has apologised.

In this instance, it is clear that the FSA has considered adequately the matter by apologising for the late delivery and changing its procedures in an attempt to prevent a late delivery occurring in the future. As such I will not be making any further recommendations to the FSA in relation to the impact the delivery may have.

Recommendations

Although I am not intending to make any recommendations in relation to the direct impact the matter had upon you, as I believe the FSA has addressed this with its apology, I will make the following recommendations in the context of the events which occurred on the evening of Tuesday 31st August 2010 specifically in relation to the delivery of packages containing confidential and sensitive materials.

- i. Since this undesirable episode, the FSA has changed its procedures regarding the delivery of documents to a person who is under investigation by its Enforcement division. I welcome the fact that the FSA will not now deliver documents to such a person after 9.00 pm without their prior agreement. I understand that the FSA believes that the delivery of items can occur until 9.00 pm as it considers "*that 9.00 pm is reasonable and is respectful of family life, for example, the 9.00 pm watershed for showing TV programmes that may be unsuitable for children has been long established*".

Although I feel that this is a much more appropriate procedure, I am still concerned that this time is still too late when delivery is to be made to a residential address. The “television watershed”, to which the FSA has referred, in my opinion, simply refers to the content and nature of television programmes and in my opinion does not represent in anyway the latest time which an allowable intrusion into family life can be made from outside the family home.

Although I accept that there may occasionally be justifiable reasons for allowing deliveries until this time, in my opinion, allowing deliveries at this time may not have due regard to the rights of other people residing at the address (particularly those not associated with the investigation whatsoever such as young children). Whilst I accept a homeowner cannot regulate the time people may call at their home, in my opinion, the 9.00 pm “television watershed” does not reflect the time many young children are in bed. I believe that encouraging deliveries until this hour is therefore inappropriate.

I welcome the fact that the FSA, in response to my Preliminary Decision, has abandoned its 9.00 pm watershed delivery argument. It has now advanced a totally different argument to justify its perceived delivery cut off time by instead stating that it *“continue[s] to believe that 9.00 pm is an appropriate cut-off time for delivering documents, unless the recipient agrees to a later delivery. Besides the reasons we have already provided... [it] consider[s] there are practical benefits to having a delivery deadline of 9.00 pm rather than 8.00 pm. Our preference is for documents to be delivered at times when the recipient is most likely to be at home.*

This is often at the end of the day, after they have returned from work. In [its] view, a delivery deadline of 8.00 pm would increase the likelihood that a person would not have returned from work and so miss delivery of the package. As they may also have to return to work the following morning before the package is re-delivered, there could be an additional delay of at least a day before it is successfully delivered and, accordingly, before they could start reviewing the documents. We therefore believe a 9.00 pm deadline would increase the likelihood that a person would be able to receive documents and may give them more time to consider their contents”.

Although I can appreciate the FSA’s reasons for the timing of this delivery, I still feel that an 8.00 pm delivery deadline would be normally more appropriate unless a later delivery time had been specifically agreed with the respondent in advance of the documents being dispatched.

I would also add that the FSA does not indicate when a delivery will be made (and does not appear to ensure that the subject of the investigation will actually be available to receive the package). I am aware that many people (particularly if they are in a house on their own) refuse to ‘answer the door’ late in the evening, especially to strangers particularly those who are not dressed in normal clothing (e.g. motorcycle couriers) unless they are expecting a delivery and as such I do not feel that it is appropriate to encourage deliveries this late in the evening.

the FSA's comments about the requirements of urgent time requirements of both Section 66(4) of the Act and the FSA's own internal procedure guides together with the problems a delayed delivery can cause, I would recommend that the FSA should review the latest time that deliveries should be made to a residential address with a view to placing a ceiling of 8.00 pm unless the subject of the investigation has agreed in advance to allow a later delivery to be made and has also stipulated the latest time which he is willing to receive documents from the FSA.

I welcome the fact that the FSA's Enforcement procedure guide now makes it good practice that the individuals should be contacted to inform them of an impending delivery (and a likely delivery time). I feel however, that this contact should be made by telephone rather than email as it is possible, particularly if individuals are travelling, that emails will simply not be picked up. Additionally a telephone call will ensure that the individual will be available to accept the delivery.

- ii. I am also concerned that the FSA is sending extremely sensitive materials (which are not in the public domain) in unencrypted discs and using a courier service which allows documents to be left with a third party or at an a different address.

Whilst I appreciate that the FSA has to be mindful of its costs, one has to consider the reputational damage which could occur to individuals (who are to receive the package) and indeed the FSA if this information was passed to the media. In arriving at this recommendation I have to bear in mind how the FSA has dealt with firms who have lost sensitive and confidential material in the past. I also must ask how the FSA would have responded had the person under investigation either lost the material or released it to the media.

I would therefore recommend that if the FSA chooses to send information to the individuals who are under investigation by courier it either uses a courier service which only allow the package to be left and signed for at the stated address or sends the information on media which is encrypted and can only be accessed with a password given to them by the FSA in a separate email.

In making this recommendation in my Preliminary Decision, I stated that I appreciated that the FSA had recently considered this particular issue, but urged it to do so again in light of my concerns. I welcome the fact that the FSA concurs with my view that the disks sent to the complainant should have been encrypted and that is currently considering whether its procedures should be reviewed in relation to the delivery of information to and whether it can/should be left with a third party or delivered to a different address.

- iii. While this recommendation arises out of a peripheral issue not the subject of the complaint made in this instance I do believe it will aid both the Regulator and the Regulated. I can appreciate the FSA's reasons for sending the PIR supporting material on a disc. However, it is also a concern to me that the FSA, before sending discs to a respondent, does not establish whether he has access to a high speed high quantity printer.

In this instance the FSA has confirmed that the documents totalled in the region of 5,000 pages. Clearly it would be unreasonable for any respondent to print this amount of material on a small personal printer (if for no other reason due to the time it would take). I feel the FSA should make it clear to respondents that, although the material will be supplied to them on encrypted discs, should they require hard copies these can also be provided (although they will not automatically be given additional time to consider the documentation).

Yours sincerely,



Sir Anthony Holland
Complaints Commissioner