

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 1 February 2007

Public Authority: Hertfordshire County Council
Address: County Hall
Pegs Lane
Hertford
SG13 8DQ

Summary

The complainant requested information on private equity investments made by the council. The council refused to supply some of the information on the basis that it was subject to a confidentiality agreement between it and various investment organisations (section 41). The Commissioner's decision is that the information should be disclosed on the basis that the public interest in knowing that public funds are being invested wisely overrides the public interest in protecting confidentiality in this instance.

The Commissioner's Role

5. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. This Notice sets out his decision.

The Request

1. The Complainant has advised that on 4 January 2005 the following information was requested from the public authority in accordance with section 1 of the Freedom of Information Act 2000, ('the Act').
 1. *A complete list (as at the latest date now available) of all the private equity, venture capital and real estate funds (including fund of funds) in which Hertfordshire County Council has an investment:*
 2. *For each such fund a note of (as at the latest date now available):*
 - a. *Hertfordshire County Council's commitment to the partnership,*
 - b. *The cumulative contributions made to date by the fund.*
 - c. *The cumulative distributions received to date by the fund, and*
 - d. *The current value of the fund's interest in the partnership, and*

- e. Any information available to the fund on the internal rate of return (IRR) that it has earned to date on its interest in the partnership.*
2. On 28 January 2005 the council replied to the request, providing the information from question 1 and 2(a) above, and the information for 2(b) and (c) for one of its funds, but refusing to disclose 2(b) – 2(e) of the information for the rest of its private equity investments on the grounds that the exemptions in section 41 (confidentiality) of the Act applied.
3. On the 23 February 2005 the complainant asked the authority to review its decision on his request, however he withdrew request 2 (e) on the internal rate of return information. The council responded on 2 August 2005 refusing to disclose the remaining information for the same reasons.
4. On 8 August 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - (a) whether he should have been supplied with the information he requested, in sections 2(b) and (c) of this request.
 - (b) whether the council was correct in its application of section 41 of the Act to his request.
 - (c) He later clarified that he also wished the Commissioner to consider section 2 (d) of his request.

The Investigation

Scope of the case

6. The Commissioner investigated;
 - whether the council were under a duty to respond to a request made to the fund, and
 - whether the council's application of the exemptions to the information was correct, or whether the information should have been supplied to the requestor as a result of his request.

Chronology

7. The Commissioner's investigating officer telephoned the council on 23 September 2006. In that call he confirmed that a request for a decision had been made. He also confirmed that as he had previously investigated and issued a decision notice on a very similar case (case FS50065853) he was of the view that the requested information should be disclosed to the complainant. He therefore asked the council to

consider disclosing the information on an informal basis. He then emailed the council on 24 October 2006 stating the same thing.

8. The council responded on 27 October 2006 stating that it was aware of the previous decision which the Commissioner had made, and was also aware that that decision was under appeal. It therefore asked the Commissioner for a stay in making its decision as to whether to disclose informally or not. The Commissioner however decided that it was not appropriate to hold a decision on this matter until that time and indicated this to the council in an email dated 31 October 2006. In that email the Commissioner also offered the opportunity of the council to add to its arguments in support of its reliance upon the exemptions. The council responded on 9 November 2006 stating that it did not wish to do so.
9. Given the statistical nature of the information requested and the response provided by the council the Commissioner did not consider it necessary to view a copy of the information concerned.

Findings of Fact

10. The Commissioner has established that Hertfordshire County Council is a public authority responsible for administering the fund. It holds all information in its own right under the Local Government Act. It is therefore under a duty to respond to the request.

Analysis

11. The Commissioner has considered the public authority's response to the complainant's request for information.

Exemptions

Section 41

12. Section 41 of the Act provides an exemption from the right to know if the information in question was provided to the public authority in confidence. There are 2 components to the exemption:
 - The information must have been obtained by the public authority from another person.
 - Disclosure of the information would give rise to an actionable breach of confidence. In other words, if the public authority disclosed the information the provider of the information could take the authority to court for breaching a duty of confidence.

13. The Commissioner recognises that as confidentiality agreements exist between the parties involved, investment information supplied to the council by the investment companies may be exempt from disclosure under section 41 of the Act.
14. However the Commissioner does not accept that a confidentiality clause will, per se, mean that all information caught by the clause should be, or will be considered confidential. To accept such a tenet would essentially allow public authorities to contract out of their obligations under the Act. The Commissioner will therefore look behind the clause to the nature of the information concerned, with a view to considering whether the clause should stand for each particular section or topic.
15. In this case the information requested in section 2 (b) relates to commitments made to the investment companies by the council (as administrators of the pensions fund). As such, the information has not been "provided to the council by another person. It cannot therefore be considered to be confidential under the exemption in section 41 of the Act. The council has put forward a view that the information has been supplied by the investment partnerships to the council. However the Commissioner's view is that where an investment partnership stipulates the amount which should be paid by the council the actual amount must be agreed, paid and recorded by the council under its own accounting procedures. They will therefore hold this information in their own right.
16. As regards parts 2(c) - (d) of the request, a duty of confidence will only be owed if the information in question has the necessary "quality of confidence". The 3 key elements for this are:
 - the information must have been imparted in circumstances which create an obligation of confidence,
 - that the information must not be trivial, and
 - that the information must not be readily available by other means.
17. The council has stated that it has confidentiality clauses in the contractual agreements with the investment firms. The first criterion is therefore met as an obligation of confidence would have specifically been created when a contract containing such a clause is agreed. In this case the information is about financial payments and returns on investments made by the council on behalf of the pension scheme members. The Commissioner notes that disclosure of similar information in other jurisdictions has attracted legal action and political and statutory intervention in the past. The information is not therefore trivial or insignificant.
18. As regards the information being available by other means, the complainant has provided evidence that information of the sort he has requested is routinely published by many organisations. However the

Commissioner must consider the specific information requested and it is his understanding that this is not widely known. Hence, although other information of this type has been disclosed by other organisations in the past, this specific information is not readily available by other means.

19. The Commissioner's decision is therefore that the information has the quality of confidence necessary for a duty to be owed.
20. However the duty of confidence is not absolute. The courts have recognised three broad circumstances in which information may be disclosed in spite of a duty of confidence. These include where the disclosure is consented to by the confider, where disclosure is required by law, and where there is a public interest in disclosing the information which overrides any duty of confidence which may be owed.
21. There are no issues surrounding consent, law, or crime in this case. This leaves a consideration of the public interest. The Commissioner must therefore consider whether the public interest in disclosing the information overrides any duty of confidence which is owed.

The pension fund

22. Hertfordshire County Council is the staff pension scheme for a number of public authorities in Hertfordshire. It is part of the nationwide pension scheme for local authorities, the Local Government Pension Scheme (LGPS).
23. The LGPS provides salary-related, defined benefits to its members. The scheme is funded through contributions from member organisations and their employees. Contributions are fixed for employees, and vary for employers based upon the amount needed to ensure benefits under the scheme are properly funded. The benefits payable are not dependent upon investment performance and so the failure or success of investments entered into by the council does not directly affect the pension rights of individuals who are members of the scheme.
24. Only a percentage of the investments made by the council will be in private equity investments. Other investments will be made in other types of investments providing more secure, but typically lower rates of return on the investment. The council provided information to the complainant which showed that at the time the request was made it had made commitments of £64 million to private equity investment funds.
25. The objectives of the Fund's funding policy include the following:
 - to ensure the long-term solvency of the Fund and of the share of the Fund attributable to individual employers or pools of employers;

- to ensure that sufficient funds are available to meet all benefits as they fall due for payment;
- not to restrain unnecessarily the investment strategy of the Fund so that the Administering Authority can seek to maximise investment returns (and hence minimise the cost of the benefits) for an appropriate level of risk;
- to help employers recognise and manage pension liabilities as they accrue;
- to minimise the degree of short-term change in the level of each employer's contributions where the Administering Authority considers it reasonable to do so;
- to use reasonable measures to reduce the risk to other employers and ultimately to the Council Tax payer from an employer defaulting on its pension obligations; and
- to address the different characteristics of the disparate employers or groups of employers to the extent that this is practical and cost-effective.
- to minimise the cost of the Scheme to employers

Private Equity Investment

26. The term private equity investment is a broad term which encompasses a number of different types of investment. Generally these investments offer a higher rate of return than other investment types over a given period of time. As with all types of investments, returns are likely to vary dependent upon a number of factors. It is however generally accepted that private equity investments involve a higher risk than other types of investment.
27. Pension funds (such as the council in this instance) will often invest a percentage of the fund into private equity investment funds on the basis of the higher rates of return they are able to generate. A number of investors will provide given sums over a given period into a particular investment fund, which is then managed by an investment manager on behalf of all of the contributors to that fund. Investment fund managers will invest portions of the fund into a number of different companies (called portfolio companies), on the basis that some, if not all of these individual investments will provide a positive return, and that overall the fund will generate a positive return at the end of a given term.
28. Private equity investments are generally only successful over a longer period of time. This is due to the nature of such investments. In the short term, commentators state that measures of performance (such as the valuation information requested by the complainant) are often unreliable in that they do not provide a good picture of the likelihood of the fund being a success later in the investment period. Commentators refer to the fact that positive returns are only successful over the longer term, known as the J-curve effect.

29. The Commissioner understands that the central reason for confidentiality in private equity investment funds is to ensure that successful investment strategies are protected, and that commercially sensitive information on portfolio companies is not divulged. This sort of information is sensitive in that disclosure would provide information about a portfolio company which could have a detrimental effect on it if it were made generally available. Companies may find it difficult to negotiate contracts and agreements when information on the funding investment they have received is disclosed. For instance, a decline in investment from a particular fund may give a false impression of the company's standing and deter other investors from investing in the company concerned. Similarly a disclosure may affect the way the company is able to negotiate and make agreements with other companies where the other company is aware of capital being invested in it.
30. The information requested by the complainant in this instance is fund level information. Fund level information does not contain information on the individual portfolio companies within a fund, but provides details on the overall investment into, returns from, and current value of a fund itself; it provides an overview of the current performance of the fund.
31. Whilst this information is not as commercially sensitive as information about the portfolio companies a fund has invested in, the Commissioner has noted the argument that it may still prove detrimental to fund managers to disclose this information. For instance, if a fund is seemingly unsuccessful based on an interim valuation and returns, it could be detrimental to the fund manager's ability to raise other funds in the future by giving an impression that the investment strategy is flawed. This however may not be the case in the long term as private equity investments may not mature until the later stages of the investment period.
32. From similar cases the Commissioner also notes that there is an argument that there is a potential for the disclosure of fund level information to allow competitors to track and copy the underlying strategies being employed by the fund manager. This could be detrimental to any competitive advantage the fund manager has obtained through his investment skills.
33. A question which the Commissioner therefore needs to consider as part of the public interest test is whether the information is commercially sensitive. If it is, then the public interest arguments in favour of maintaining the duty of confidence are strengthened as any disclosure could be detrimental to the funds ability to maximise its capital and could also damage the relationship between the council and fund managers.

The public interest

34. The central argument for the public interest in disclosing the information in this case surrounds the creation of transparency and accountability of public bodies in their decisions and actions in investing public money. Money which has been paid into the pension fund by the member organisations and their employees is invested by the council with a view to maximising the size of the fund. If the fund were to fall short of the required amount to meet its commitments it would fall upon the member organisations to increase their contributions to the fund in order to ensure its ongoing viability. The need to make extra contributions may take funding away from other Council functions and services, to the detriment of the local community. Any shortfall would then need to be made up through additional public resources. As stated, the current commitments of the council in this instance amount to approximately £64 million – a substantial amount of public money is therefore committed to these types of investments. There is therefore a strong public interest in the disclosure of the information given that any losses or underperformance which occurs must be compensated for by further public funding.
35. There is therefore a clear public interest in the general public being able to scrutinise the council's investment strategies. The council can then be held accountable for the decisions it takes with public funds, and any issues about underperformance can be scrutinised and questioned. Where investment management is shown to be good the disclosure of this information will provide public confidence in the council's decision making and its financial management of the fund.
36. The council may state that the public interest in transparency and accountability is already met as it produces annual reports and accounts and these include global figures on the success or failure of the private equity investments. The Commissioner has considered this argument, but he notes that the disclosure of global figures alone would not provide detail on the individual performance of funds. By not providing this sort of information the public are not able to analyse whether the fund is maximising its efficiency and investment potential. Neither does the disclosure of this limited information sufficiently render transparent the council's investment decisions with respect to the funds.
37. The Commissioner has also noted the contents of the Audit Commission's letter to the Secretary of State in its public letter dated 26 July 2006. In that letter Sir Michael Lyons, acting Chairman of the Audit Commission criticised the overall lack of transparency in LGPS pension's management and made suggestions for greater accountability by its members. It is noted that this criticism is directed at the overall transparency of the funds. Less information is generally disclosed on private equity investment performance than other investments due to the historically guarded nature of such investments.

The arguments put forward in this letter therefore apply with added relevance as regards private equity investment.

38. A disclosure of information on the performance of individual funds would contribute to ensuring the effective oversight of the level of public funds being invested with particular managers and show that the risks associated with these types of investments are being adequately managed by the council. Alternatively it is possible that a number of the funds may be significantly underperforming year after year, and without information at the level of individual funds it would not be possible for interested parties to properly scrutinise any decision by the council to continue investing in those funds.
39. In addition, the ability of other authorities to know the level of success or failure, or the underlying trends in such investments would allow these authorities to make better informed decisions on the fund managers, or types of funds in which to invest. This may increase value for money, thereby lessening the burden upon the taxpayer, particularly at a time when pension contributions are a matter of public debate.
40. However the public interest arguments above need to be considered against the strong public interest in maintaining the duty of confidentiality which the council owes to the investment organisations. In essence, the public interest arguments for upholding the confidentiality of the information in this case surround the question as to whether a disclosure would prejudice the commercial interests of the parties concerned. If so, it must also be considered whether this would create a greater burden on tax payers by being detrimental to the council's ability to maximise its fund through its investment management.
41. The Commissioner has considered:
 - a) whether the information is commercially sensitive, and that it may provide an unreliable view of the performance of the funds.
 - b) whether there is a possibility that disclosure could divulge information which could allow competitors to track the investment strategies of the fund manager,

Is the information commercially sensitive?

42. There is an argument that if the information requested was disclosed it would prejudice the commercial interests of the council, the fund managers and the funds/companies in which it invests. The Commissioner has considered these arguments in relation to the information requested. It is noted that section 43 of the Act provides an exemption to the disclosure of information which would be prejudicial to the commercial interests of any party. Other councils in cases similar to this one have claimed section 43 in addition to section 41 and so the

Commissioner has considered the application of this exemption to the information in order to fully consider the public interest test required in the common law of confidence.

43. The Commissioner has noted that the request does not cover information on portfolio companies. He does not therefore need to consider further any likelihood of prejudice to the commercial interests of portfolio companies within the funds. Fund level information would not provide direct information on portfolio companies and disclosure would therefore be far less likely to prejudice those companies who receive investment from a particular fund.
44. In previous cases of this sort, pension funds have provided evidence that if they disclose the requested information they may be prevented from investing in some of the funds. The argument is that funds will refuse to allow investment by public sector bodies if they are aware that information which they consider commercially sensitive will be disclosed by those bodies in response to an FOI request. In previous cases public authorities have provided letters from investment firms to the Commissioner clearly stating that this may be a repercussion of the disclosure of this sort of information. The Commissioner has not been provided with specific evidence that public authorities have been prevented from investing as a consequence of disclosure, but he is aware that exclusions have occurred in a very limited number of well publicised cases in other jurisdictions in the past. The Commissioner has considered these arguments but, given the extremely limited examples of this happening in the past, his decision is that exclusion must be considered unlikely given that many public authorities both in the United Kingdom and in other jurisdictions do make this sort of information available.
45. In considering these arguments he has taken into account the evidence provided by the complainant that private equity investment information is already disclosed by many organisations. The likelihood of detrimental effects occurring must therefore be considered in context given that other organisations choose to make this information available. The complainant supplied the following evidence:
46. The online version of the Financial Times on 16 January 2005 edition reported a partner at PERMIRA, a leading private equity company as saying:

"We've had a number of years of FOIA experience in the US. As long as what we're asked to provide by the the UK funds is the same, I don't see why we shouldn't provide that information."

It is noted that PERMIRA are one of a number of investment companies with which the council currently invest.

47. In addition the complainant has provided evidence that Standard Life European Private Equity Trust plc, one of the leading UK investment companies with investments with many of the top investment funds, voluntarily discloses this sort of information on a regular basis, and has done for some time. In spite of this it has maintained good relationships with fund managers and continues to invest with many of the leading investment firms.
49. The complainant has explained that his company has received this sort of information from over 30 UK public authorities, and over 300 public authorities in the United States.
50. Although the Commissioner must concede that there is a possibility that the council could be excluded from investing with some funds he has to consider that the above evidence strongly suggests the likelihood of any detrimental action being taken against the council is low. The public interest argument that disclosure would be detrimental to the pension funds member authorities (and hence tax payers) because of such exclusions is therefore greatly weakened by this evidence.
51. There is also an argument that if the council discloses this sort of information then fund managers may limit the amount of information they make available to it in order to protect their commercial interests. Again the Commissioner must consider this in context. This has not occurred to the many other public authorities, (includes many hundreds of authorities in the United States), who regularly disclose this sort of information. The Commissioner must therefore consider that it is unlikely to occur in this instance.
52. The request in 2(b) asks for the cumulative contributions made to date by the Herts CC for each fund in which the council has invested. The cumulative contributions will supply information on the amounts of money paid by the council to the individual funds, broken down into its constituent payment amounts. This would potentially allow competitors to track the amounts paid into the funds and allow a pattern of investment to be built up. The council also argues that it may allow competitors the knowledge that a particular fund manager was drawing funds to invest. It also states that their ability to raise funds may be affected if this information was made publicly available.
53. However the Commissioner does not accept that it is likely that fund level information would provide adequate information or opportunity to track the strategies of the fund managers to the extent that they would lose their competitive advantage over their commercial competitors. Whilst it is accepted that there may be a possibility that competitors would be able to tell that a particular fund manager was drawing funds to invest in particular types of fund, such as a hedge funds or a buy out funds, the lack of information on portfolio companies within the funds severely limits the harm such a disclosure might cause. The

Commissioner considers that his decision must be proportionate to the likely prejudice, and in this case he considers that the public interest in accountability and transparency overrides any duty of confidentiality owed on this basis.

54. The requests in sections 2(b) – (d) are for information which would give a snapshot of the current success or failure of a particular fund. If a fund is seemingly unsuccessful the argument against disclosure is that fund manager's ability to raise investors for other funds may be damaged and confidence in his management of such funds questioned.
55. However, as discussed above, the complainant has provided evidence that many organisations publish this sort of information on a regular basis. There is therefore a strong argument that the detriment foreseen by the council is unlikely as others disclose this sort of information without, in the vast majority of cases, suffering adverse effects.
56. The Commissioner accepts that interim information on the performance of a particular fund may not be a reliable marker of the overall or eventual performance of that fund. However this will be generally known by interested parties and, in any event, the council would be able to clarify that this is the case when disclosing the information to the requestor. The ability to add a caveat to the disclosure of the information reduces any likelihood that information may be misconstrued as indicating underperformance by a fund, thereby reducing any likelihood of any prejudicial effect the fund managers may face when seeking investors for further funds.
57. There is also an argument that a disclosure of this information would be detrimental to the relationship the council enjoys with fund managers. However the Commissioner considers that fund managers would be aware that as a public authority the council would be subject to greater levels of public scrutiny than private companies, and that it will be under a duty to be as transparent and accountable in its dealings as possible. Equally he considers the fact that other authorities disclose this information lessens any impact the disclosure of the information would have on the investment managers in this case.
58. The test in section 43 is whether prejudice is "likely" to occur. For the reasons provided above the Commissioner's view is that it is not likely that a disclosure of this information would result in prejudice to any parties, particularly given the limited nature of the information being disclosed.
59. The Commissioner therefore considers that the likelihood of disclosure being prejudicial to the commercial interests of any party is low. He has balanced the arguments put forward in support of this view against the strong public interest in transparency and accountability in the expenditure of public funds, and the public interest in creating

confidence in the decisions being made by the council in carrying out its functions. The direct result of a reduction of the capital available to the pension fund would be an increase in the level of contributions each participating authority would need to make. This would be likely to result in additional payments being required from taxpayers to balance out any shortfall in fund levels.

60. The Commissioner has considered the fact that in previous common law cases involving confidentiality the House of Lords has indicated that the reason for seeking disclosure may be relevant to the decision as to whether a duty of confidence should apply or not. Of note is the view that those seeking to disclose information should not, at the heart of their reasoning, be seeking to “steal a march” on their competitive rivals in seeking the disclosure. In this case the Commissioner notes that the complainant is employed by a company which collates and sells statistical reports on investment funds and investment opportunities. It seems likely therefore that the complainant’s reason for requesting this information may be one of profit.
61. Whilst the Commissioner notes that this is the case, he has also taken into account the general public interest in this information being disclosed. It is noted that many public authorities invest a section of their pension funds in private equity, and hence many tax payers will indirectly be investing in such investments. Additionally he has considered the resultant effect upon the public purse should such investments fail to produce the hoped for returns. Given the higher risk associated with such investments, the Commissioner considers that a very strong public interest lies in allowing greater scrutiny of the investment levels, risks and returns the council is obtaining in its management of these functions.
62. In the case of *Derry City Council v The Information Commissioner* (case ES/2006/0014), the Information tribunal looked at the applicable public interest test to decide whether a breach of confidence was “actionable” for the purposes of section 41. It found that one should start from an assumption that confidentiality should be observed unless this is outweighed by the countervailing public interest factors. The Commissioner considers that the test applicable is therefore a balancing of the public interest in putting the information in to the public domain and the public interest in maintaining the confidence; if the factors balance equally then confidence should be maintained. In this case the Commissioner considers that the balance rests firmly with putting the information into the public domain.
63. For the reasons provided above, the Commissioner's view is therefore that the public interest in disclosing fund level information overrides the public interest in upholding any duty of confidence the council owes to the investment organisations. He does not therefore believe that a disclosure of this information would amount to an actionable breach of

confidence by the council. The exemption in section 41 is not therefore applicable.

The Decision

64. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

65. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
66. **The public authority must disclose the information falling within the scope of the request.**
67. The public authority must take the steps required by this notice within 35 calendar days from the date of this notice.

Failure to comply

68. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

69. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 1st day of February 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
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SK9 5AF**