

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 March 2016

**Public Authority:** Cheshire West and Cheshire Council

**Address:** HQ Building  
Nicholas Street  
Chester  
CH1 2NP

#### Decision (including any steps ordered)

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1. The complainant has requested recorded information concerning investments made by Cheshire Pension Fund in Private Equity Funds.
2. The Commissioner's decision is that the Council is entitled to rely on section 41 of the FOIA on the grounds that the information required by the complainant is confidential.

The Commissioner requires the public authority to take no further actions in respect of this request.

#### Request and response

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3. On 12 January 2015, the complainant wrote to Cheshire West and Chester Council to ask the following questions:

*"Can you please tell me where I can find [mention of £449,000 investment by CPF in Wonga]. Was the Inside Housing report an error. Can you please confirm if it was an investment in 2013, is it still and will it remain an investment."*

4. The Council made its first response to the complainant on 9 February 2015: The Council advised him that – 'The information contained within the Housing report was correct at the time of going to press. Cheshire does not hold any direct investments in Wonga. The fund does however retain a small exposure to the business through a private equity fund

arrangement. We estimate that this equates to 0.004% of Fund assets at 31 December 2014'.

5. The Council made a second response to the complainant on 12 February. It advised him that the Council does not provide details of the underlying holdings in pooled funds or limited partnerships and that it does not list the underlying companies within investments as there are over 10,000 of these.

6. On 16 March the complainant made a request for recorded information under the following terms:

*"Can you please send me details of the 10,000 investments held by CPF [Cheshire Pension Fund] as discussed below (nearly one month ago)."*

7. The Council responded on 20 March, advising the complainant that it discloses its full holding in a list of public equities on the Fund's website at: [http://www.cheshirepensionfund.org/?page\\_id=5028](http://www.cheshirepensionfund.org/?page_id=5028)

8. The Council advised the complainant that '[it] discloses its full holding in public equities on the Fund's website. In contrast to publicly traded equities [...] private equity investments are by their nature private' and 'that confidentiality agreements contained within those investments prevent [the Council] from releasing the full list of holdings'.

9. On 1 April the complainant made another request for information. He asked for:

*"[...] details of the amount invested by CPF in any company involved in gambling or loaning money in the UK and abroad, in the last three years, whether directly or indirectly through managed funds. An extract onto a spreadsheet will be fine."*

10. On 15 April the complainant chased the Council for a response to his request of 1 April and added the following clarification:

*"...supply me by email with a spreadsheet containing over 10,000 (mentioned in your 25 February email to me) all latest or current investments held by CPF whether direct investments or as parts of funds managed by others on behalf of CPF directly or indirectly."*

11. The Council responded to the complainant's requests on 28 May. The Council confirmed that it holds information relating to his requests and provided him with a spreadsheet of the full list of all assets and securities held by CPF on 31 March 2015.

12. In respect of the 10,000 figure quoted by the complainant, the Council informed him that this figure relates to investments in Private Equity Funds is listed in Worksheet 8 of the disclosed spreadsheet. The Council informed the complainant that this information is exempt from disclosure under section 43 of the FOIA – where disclosure of the information would prejudice or would be likely to prejudice the commercial interests of the Council and its suppliers – Pantheon and Adam Street Partners.
13. On 6 June the complainant asked the Council to review its application of section 43 of the FOIA. The complainant stated his view that section 43 cannot apply to funds and investments and he suggested that the information should be placed on the CPF website and, if necessary, it could be by a sign-on code/password to members of the CPF.
14. On 10 July, having completed its review, the Council advised the complainant that:
  - To provide the information requested on 1 April, the Council would be able to rely on section 12 of the FOIA. The cost in officer time to go through the extensive lists of investment entities to identify any companies involved in gambling or loaning money, whether directly or indirectly, would exceed the time/costs limit provided by the FOIA.
  - The information withheld under sections 41(1)(a) and (b) and section 43 was justified. The Council explained that finding arrangements are contractual and most of the entities are contracted on a general understanding of confidence and confidentiality. The review decided that the Council was correct in asserting non-disclosure on the basis of 'commercial sensitivity' and therefore exempt from disclosure under section 43.

## **Scope of the case**

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15. The complainant contacted the Commissioner on 17 July 2015 to complain about the way his request for information had been handled. The complainant explained that he has been trying to get his pension fund to be more open about their investments; originally in regard to the CPF investments in companies such as Google and Amazon and investments in property in places such as Staines, Southampton, Canterbury and Leicester. He advised the Commissioner that he had lately discovered that the CPF has an investment in Wonga which he had publicised to the local press.

16. The Commissioner considers that the complainant's request of 1 January is a request for answers to be given to his questions rather than for recorded information. That communication is not considered in this notice.
17. The complainant's requests of 16 March, 1 April and 15 April relate to recorded information which the Council has confirmed it holds. The Commissioner has therefore investigated whether the Council is entitled to rely on sections 41 and 43 of the FOIA as a basis for refusing to provide the withheld information. This notice sets out the Commissioner's decision.

### Reasons for decision

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18. In its response to the commissioner's enquiries, the Council changed its position concerning the information it holds. It now seeks to rely on Section 3(2) of the FOIA on the grounds that the Council does not hold the specific information which the complainant seeks. It explained that only the first tier of investment information is provided to the Council and the Pension Fund.
19. The Council pointed out that the complainant had asked for:

'...a spreadsheet containing over the 10,000 (mentioned in your 25 February email to me) all the latest or current investments held by CPF whether direct investments or as parts of funds managed by others on behalf of CPF directly or indirectly.'
20. The Council explained that the pension fund has three layers of investment: Partnership investment - which the fund discloses; underlying partnership investment - which the fund will disclose if requested; and underlying portfolio companies, which the fund will not normally disclose.
21. The Council stated that, 'As the request is for information held in the third tier of investment the Council and the Pension Fund does not hold this information pursuant to section 3(2)'.
22. Section 3(2) of the FOIA states:

"For the purpose of this Act, information is held by a public authority if –

  - (a) It is held by the authority, otherwise than on behalf of another person, or
  - (b) It is held by another person on behalf of the authority.

23. The Council has assured the Commissioner that it has never received or held information to the level of detail as that required by the complainant. The Council has further assured the Commissioner that it has disclosed to the complainant all of the information it actually holds.
24. Page 8 of the disclosed spreadsheet sets out the level of information which the Council actually holds. The Council explained to the Commissioner that it has had informal dialogue with the complainant, during which it has stated that the underlying investments would amount to around 10,000 names.
25. The Council explained to the Commissioner that it invests in a limited partnership fund structure with a number of other investors. Investments are then made by the limited partner into underlying private equity funds, which in turn invest in underlying companies. It is this final layer of investment which the complainant seeks.
26. It is Council's position is that it does not hold details of this final layer of investments and that this information is not held by any third party on the Council's behalf. The Council assures the Commissioner that it does not know the identity of the underlying funds in which investments are made.
27. The Council has referred to the Commissioner to three contractual agreements which concern the underlying investments and the provision of information to the Council and Pension Fund. The agreements make clear the level of information which will be provided to the Council.
28. In one of the agreements the information which is to be supplied to the Council is limited to:
  - The name of the underlying partnership fund,
  - The limited partner's pro-rata contributions to the underlying partnership fund as of a specified date, minus the cost of such limited partner's pro-rata distributions from underlying partnership fund as of a specified date,
  - The pro-rata valuation of the underlying partnership fund interest of such limited partner,
  - The underlying partnership fund's unrealized appreciation/depreciation, and
  - Such limited partner's pro-rata unfunded commitment to the underlying partnership fund as of a specified data.

29. The Commissioner has considered the contents of the contractual agreements between the Council and the Pension Fund's Investment Managers.
30. The primary concerns of these agreements are the confidentiality and commercial sensitivity of investment-related information: The effect of the agreements, rather than to persuade the Commissioner that the information is not held – and therefore subject to section 3(2), they have the opposite effect. They confirm that the Investment Managers hold information relevant to the complainant's request: In the Commissioner's view the information held by the Investment Managers is held on behalf of the public authority as it flows directly from the Council's investments.
31. The agreements attempt to define the level at which information will be disclosed to the Council and the purposes for which that information can be used. This being the case, the Commissioner has decided that the Council is not entitled to rely on section 3(2)(b) of the FOIA.
32. The Commissioner is therefore required to consider the Council's alternative position in respect of sections 41 and 43.

#### **Section 41 – information provided in confidence**

33. Section 41(1) provides that –

“(a) Information is exempt information if it was obtained by the public authority from any other person (including another public authority) and,

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

34. As stated above, the Council has not been provided with information below the first tier of investment. That information is held by Pantheon and Adam Street Partners who are the managers of the relevant funds.
35. The Commissioner accepts that the managers of the funds would need to provide the Council with the information which the complainant seeks.
36. To properly engage section 41, disclosure of the requested information must give rise to a possible actionable breach of confidence. This requires the information to have the necessary quality of confidence. The information must therefore be more than trivial and not be otherwise accessible.

37. The information needs to be communicated in circumstances which import an obligation of confidence. This obligation can be expressed implicitly or explicitly.
38. Finally, unauthorised disclosure of the information would need to cause detriment to at least one party.
39. In this case, the information sought by the complainant is subject to agreements between the Council and the Private Equity Managers. This is evidenced by the contractual extracts provided by the Council.
40. The Commissioner has no doubt that the parties who entered into these agreements, each consider that the information is both confidential and prejudicial to their interests.

*The Council's representations*

41. The Council asserts that the private equity market is extremely competitive and that maintaining this competition is a key component in driving performance and reducing costs.
42. Likewise, the information covered by the agreements is highly commercially sensitive and essential to both the funds' and their managers' future success.
43. The Council considers that a breach the confidentiality restrictions, as set out in the agreements, would weaken the manager's competitive position.
44. It believes that the confidential information is extremely market-sensitive and is likely to be used by the competitors of the Private Equity Managers and of the managers of portfolio investments.
45. The Council also considers that disclosure of the requested information would impair the managers' ability to raise future capital and would affect their ability to access dealflow<sup>1</sup> in the secondary and co-investment markets.
46. The Council points out that the requested information is of significant commercial value to the managers of investment portfolios. The value of the information lies in the development of their approaches to

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<sup>1</sup> A term used to refer to the rate at which private equity investors receive business proposals and investment offers. It may also refer to the stream of offers or opportunities. An organisation's dealflow is considered good if it results in enough revenue or equity generating opportunities to keep the organisation operating at its peak capacity.



investments which has developed over many years of investing capital across the world.

47. The Council accepts that the sharing of information with investors is essential. Shared information enables it and other investors to understand how their capital is invested, the nature of the investments and what it costs to make these investments. Nevertheless, the Council strongly asserts that jeopardising confidentiality would significantly impair the portfolio managers' ability to share appropriate information and prejudice their ability to provide a full service to their clients.
48. The Council points out that public pension funds are not the only investors in Private Equity funds. It considers that disclosure of the requested information would have detrimental effects on the many other organisations who invest with these managers.
49. One of the core competitive advantages of the relationship the Council has with the portfolio managers is the strong relationships which have developed over time. Access to the best managers is often constrained and it may take many years to build successful relationships based on trust and integrity.
50. If the Council was to disclose such highly commercially sensitive information as that requested by the complainant, not only would it compromise the Pension Fund, it would also compromise the competitive position of each manager and their investments. It would expose the Council to being sued and it would potentially no longer be able to access investments which would be available to those investors in a position to maintain confidentiality.
51. The value of portfolio companies is underpinned by their competitive positions in the markets and in their ability to grow revenue, improve margins, buy similar businesses and retain the best talent. The Council considers that disclosure of the requested information could seriously damage the value of these companies.
52. The Council advises the Commissioner that Private Equity is the key driver of returns for public pension funds and it is these which outperform public markets over the long-term. Consequently it is important for the Council to have access to this type of investment; particularly at a time when many such funds are struggling to meet their return targets.
53. The Council maintains that the requested information is confidential for the purpose of its original position that it is exempt from disclosure under section 41.



54. The Commissioner has decided that section 41 is engaged: He finds that the requested information has the necessary quality of confidence being more than trivial, not publicly available and that disclosure would open the door to an action being brought against the Council for a breach of confidence.
55. Section 41 is an absolute exemption and is not subject to consideration of the public interest test under the FOIA.
56. There is however a recognised defence to an actionable breach of confidence which requires the public interest to be considered. The Commissioner has therefore set out below those factors which he considers to be relevant to the potential disclosure of the requested information.

*Public interest factors which favour disclosure of the requested information*

57. The Commissioner will always give necessary weight to the public interest where disclosure of information provides accountability and transparency for decisions taken by public authorities and where, as in this case, the decisions are likely to concern significant amounts of public expenditure over a long period of time.
58. In this case disclosure of the detailed investment information which the complainant seeks would allow the public to judge whether the Council was investing wisely and ethically and whether it was achieving value for money.
59. The information, should it be disclosed, could promote public debate and allow the Council's council tax payers and Pension Fund stake holders to greater understand the decisions which affect them.

*Public interest factors which favour the withholding of the requested information*

60. In this case it is clear to the Commissioner that it was always the Council's and Investment Manager's intention that this type of investment information should be treated confidentially.
61. The Commissioner recognises the value of the requested information to the public and to other investment managers operating in this competitive market. He acknowledges that disclosure of the requested information would negatively impact the portfolio managers themselves and would impair the Council's ability to achieve, what it considers, the best investment outcomes for its pension stakeholders.
62. The confidential nature of the information and the agreements associated with it cannot be ignored. The Commissioner must accept

that the purpose of the agreements is to allow necessary discussion of investment-related issues in such a way that the investments and investment strategies are not adversely affected. This must also be coupled with the detriment to the Council's Pension Fund stakeholders which would likely flow from the Council's reduced ability to invest broadly in the future.

63. Making the investment information public by virtue this request would likely damage the strong relationship of trust which the Council assures the Commissioner exists between itself and the Private Equity managers. Disclosure of the investment information would potentially have significant and detrimental effects on the Council's ability to work with these managers in the future and this in turn could potentially reduce the Council's investment opportunities and thereby its future returns.
64. It should also be noted that the investment information in question here, is not of a type which is normally made public. If this information was placed into the public domain, the Commissioner believes there would be a real potential for current and future Private Equity managers to be put off from contracting with the Council: Ultimately the Council would have to make up any shortfall in its investment revenue from elsewhere at a time when Councils are financially constrained.

*The Commissioner conclusions*

65. Weight must always be given to the Council being transparent and accountable for its decisions. This is especially so where significant amounts of money are concerned and where the revenue from its investments is important to the futures of large numbers of people.
66. He also recognises the inherent public interest in the ability of the Pension Fund to make effective investments.
67. The Commissioner considers that accountability of investments is partially achieved through the publication of details of the Pension Fund's website and in its annual statements.
68. Where members of the public consider that the Pension Fund is failing to meet satisfactory standards, it is open to them to raise those issues with the Council or with their elected representatives.
69. Ultimately the Commissioner has decided that the greatest weight has to be given to the confidential nature of the investment information which the complainant seeks. He cannot dismiss the clear, unambiguous and contractual requirements that this information should remain confidential. It is for this reason that the Commissioner has decided that

the Council is entitled to withhold the requested information in reliance on section 41 of the FOIA.

70. In view of the Commissioner's decision above, he has not gone on to consider the Council's alternative and additional reliance on section 43.

## Right of appeal

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71. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

72. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

73. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**