

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 22 September 2016

**Public Authority:** South Tyneside Council  
**Address:** Town Hall & Civic Offices  
Westoe Road  
South Shields  
Tyne & Wear  
NE33 2RL

#### **Decision (including any steps ordered)**

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1. South Tyneside Council (the Council) is the administrator of the Tyne & Wear Pension fund. The complainant submitted a request to the Council for information concerning private equity investments made by the Pension Fund. He specifically sought the names of the underlying funds which the Council had invested in via private equity fund of funds. The Council sought to withhold the information in question on the basis of the following sections of FOIA: 41(1) (information provided in confidence), 43(1) (trade secrets) and 43(2) (commercial information). The Commissioner has concluded that the requested information is exempt from disclosure on the basis of section 41(1).

#### **Background**

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2. This request focuses on information concerning the Tyne and Wear Pension Fund (the Pension Fund) which is the staff pension scheme created by statute for the five local authorities in Tyne and Wear, and a number of other bodies such as schools and colleges. The Pension Fund is part of the nationwide pension scheme for local authorities, the Local Government Pension Scheme, and provides salary-related, defined benefits to its members. The Council is the administrator of the Pension Fund.
3. Of the investments made by the Council on behalf of the Pension Fund, 7.5% are in private equity investments. These investments tend to offer a higher rate of return than other investments over a given period of time, albeit that it is generally accepted that private equity investments

involve a higher degree of risk than other types of investment. The Council will make other investments on behalf of the Pension Fund in other types of investments which provide more secure, but typically lower rates of return on the investment.

4. The request which is the focus of this notice concerns the investments the Council has made through private equity fund of funds. Private equity fund of funds are investment vehicles which invest in several different private equity funds. The Council has provided the complainant with the identity of the fund of funds in which it has invested. However, it has refused to disclose the identity of the specific funds in which the fund of funds have invested in.

## Request and response

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5. In response to a number of requests made by the complainant, the Council had provided him with information relating to the directly held investments made by the Pension Fund. As part of these disclosures the Council had provided the complainant with a spreadsheet detailing the Council's commitments to private equity funds, including the amount of the original commitment to the investment, the contributions made, distributions received from the investment and the investment's current market value. The complainant then submitted the following request to the Council on 16 November 2015:

*'Thank you for your response. I resubmit my response and limit it in the following ways:*

*In relation to the underlying fund investments of your funds of funds [ie listed on the aforementioned spreadsheet] and in relation to the most recently available quarter:*

*Name of fund:*

*Commitment:*

*Contributions from inception to reference date:*

*Distributions from inception to reference date:*

*NAV as at reference date:*

*Reference date quarter:*

~~*In each case "reference date" shall mean each quarter end from 31 March 2000 to date.*~~

*In short, I am interested in mapping out which underlying funds you have exposure to. I do not require any other information.*

*I note the basis of your denial and accept this fully. However, you should understand that the way that section works is that it gives me the right to £450 worth your time approximately every two months. (i.e. the £450 resets after two months and a new request can be filed). I therefore ask you to fulfil my request upto the value of £450.'*

6. The Council responded on 11 December 2015. It confirmed that it held the information requested, namely the names of the underlying funds to which the Council had exposure via its fund of funds investments, but it considered it to be exempt from disclosure on the basis of sections 41(1) and 43(2) of FOIA.
7. The complainant contacted the Council on 11 January 2016 and asked for an internal review to be conducted.
8. The Council informed him of the outcome of the internal review on 16 February 2016. The review upheld the application of the exemptions cited in the refusal notice.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 17 February 2016 in order to complain about the Council's refusal to disclose the information he had requested. As explained above, the withheld information consists of the names of the underlying private equity funds in which the Council has invested in via its fund of funds. The complainant provided the Commissioner with submissions to support his view that the requested information was not exempt from disclosure under FOIA and the Commissioner has referred to these submissions at the relevant parts of her analysis below.
10. During the course of the Commissioner's investigation, the Council also argued that in addition to section 41(1) and 43(2), the information was also exempt from disclosure on the basis of section 43(1), the trade secrets exemption.

## Reasons for decision

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### Section 41 – information provided in confidence

11. Section 41 of FOIA states that:

*'(1) Information is exempt information if—*

*(a) 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.'*

12. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.

13. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd [1968] FSR 415*. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether an unauthorised use of the information would result in detriment to the confider.

14. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

#### Was the information obtained from a third party?

15. The Council has explained that the names of the underlying funds within the fund of funds have been provided to it by its private equity fund managers, namely HarbourVest Partners (UK) Ltd and Pantheon Ventures (UK) LLP. The Commissioner is satisfied that the Council has clearly obtained the withheld information from a third party, namely the fund of funds managers named by the Council.

Does the withheld information have the necessary quality of confidence?

16. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.
17. The Council argued that it was clear that the withheld information has the necessary quality of confidence. It explained that both private equity fund of funds managers have taken significant steps to ensure the confidentiality of their investment strategies, and thus the names of the funds in which they have invested in, are not in the public domain. Furthermore, the Council explained that it was clear that this information was more than trivial.
18. On the basis of these submissions the Commissioner accepts that that the withheld information has the quality of confidence.

Was the withheld information communicated in circumstances importing an obligation of confidence?

19. An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.
20. In the circumstances of this case the Council has explained that the withheld information was provided to it under contractual obligations it had entered into with the private equity fund of funds managers. These agreements, under which the Council invests in the private equity market, all contain confidentiality provisions. The Commissioner was provided with examples of these provisions. The Council acknowledged that although a confidentiality clause does not itself prevent disclosure of information, such a clause alongside the fact that investment strategies within the private equity market are highly guarded, does impose an obligation of confidence on the Council.
21. In light of these provisions, and indeed given the nature of the withheld information which the Commissioner accepts is closely guarded by the confiding parties, the Commissioner is satisfied that the Council received the withheld information in circumstances where it was obliged to keep it confidential.
22. In reaching this conclusion the Commissioner is conscious that in his submissions the complainant emphasised that he only wished to know the names of the underlying funds to which the Council has exposure to. He did not wish to know which underlying fund belonged to which private equity fund of funds. Nevertheless, the Commissioner is satisfied that the circumstances in which the Council was provided with the

withheld information make it sufficiently clear that the fund managers considered each and every part of the information provided to have been shared on the basis that it would be kept confidential.

Would disclosure be detrimental to the confider?

23. The complainant argued that disclosure of the withheld information would not harm the commercial interests of any party or be detrimental to them. (Moreover, even if such disclosure did have such effects, disclosure was still in the public interest, a position considered in further detail below). In order to support this position, the complainant argued that other local government pension funds already published similar information without question.<sup>1</sup> Furthermore, as discussed in the preceding paragraphs, the complainant noted that he was not seeking to establish which fund of funds had invested in which underlying funds; rather he was simply seeking the names of the underlying funds themselves unlinked to the parent fund of funds.
24. The Council noted that although detriment is not a prerequisite of an actionable breach of confidence, it was satisfied that, having consulted with its fund managers, disclosure of the withheld information would be detrimental to them.
25. Firstly, the fund managers argued that disclosure of the underlying fund investments would essentially reveal the investment strategy for each fund of funds. They argued that such a disclosure would cause it competitive harm as the private equity sector is highly competitive and investment strategies, including details of which funds are invested in, are tightly guarded. Some of the value of these strategies is derived from the fact they are not generally known and therefore cannot be replicated. Secondly, the fund of funds managers explained that they are themselves subject to confidentiality provisions in respect of the individual funds in which they invest. Disclosure of the identity of these funds could result in the fund of fund managers being subject to litigation from the fund managers in question and thus exposed to the associated time and costs of such action. Thirdly, disclosure of such information could cause fund managers to refuse the fund of funds the

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<sup>1</sup> He cited the following examples:

West Yorkshire Pension Fund

<http://www.wypf.org.uk/Member/Investments/PrivateEquityPortfolio/PrivateEquityPortfolio.aspx>

The Royal County of Berkshire Pension Fund

[http://www.berkshirerpensions.org.uk/bpf/downloads/download/5/freedom\\_of\\_information](http://www.berkshirerpensions.org.uk/bpf/downloads/download/5/freedom_of_information)

opportunity to invest in such portfolio partnerships or successor funds. This would impact negatively upon the portfolio construction and risk characteristics of its funds.

26. Furthermore, the Council argued that in respect of the information published by the other pension schemes referred to by the complainant (see footnote 1) such information is not data relating to the respective underlying fund of funds investments of the named pension funds. Rather the Council argued that the published data referred to by the complainant is akin to the type of data it provided to him in response to his previous requests, ie the spreadsheet referred to above in paragraph 5. Thus the Council disputed the complainant's suggestion that other pension funds had published the type of data that it was seeking to withhold in response to this request.
27. Finally, the Council explained that it was of the view that disclosure simply of the names of the underlying funds – unlinked to their parent funds – could still be detrimental to the fund of funds managers. This was because those with knowledge of private equity would ultimately be able to identify which investments have been made a particular fund of funds.
28. Such identification could take place in a number of ways, for example:
  - It is common practice for private equity funds to include the firm name in the name of their funds. The name of the firm could then be researched to identify the type of fund and link it to a particular fund of funds.
  - Disclosure of the names of the funds would disclose the type of investment strategy of the fund manager, eg 'biotechnology'.
  - It is common practice for successive private equity funds to contain a roman numeral in their name so where a fund of funds had invested in two or three funds of a manager the roman numerals would allow an identification to a particular fund of funds.
29. The Commissioner is satisfied that disclosure of the withheld information would prove to be detrimental to the Council's fund of funds managers. She has reached this conclusion because she accepts that the private equity industry is clearly a competitive one and thus it is plausible to argue that disclosure of information that would provide a fund manager's competitors with an advantage is likely to be detrimental to the fund manager in question. Furthermore, the Commissioner has reviewed the information cited by the complainant referred to at footnote 1. The Commissioner agrees with the Council that such information is clearly akin to the information already disclosed by the



Council and thus it is not possible, on the basis of the two examples provided by the complainant, to argue that the other public authorities had already disclosed similar information to that which is the focus of this complaint. Finally, the Commissioner is persuaded that a motivated individual, with knowledge of the private equity sector, would, with reasonable accuracy, be able link the withheld information to the parent fund of funds. In reaching this particular finding the Commissioner considers it important to recognise that there are only a limited number of fund of funds in which the Council has invested. Consequently, if the withheld information was disclosed there are only a limited number of fund of funds that each individual fund would have to be linked to.

### **Public interest defence**

30. However, although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest.
31. The Council was firmly of the view that there was a significant public interest in maintaining the duty of confidence in this case. It emphasised that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong, since the duty of confidentiality is not one which should be overridden lightly. It noted that there was no suggestion that the Council has engaged in misconduct, illegality or gross immorality with regards to its private equity investments which would warrant the disclosure of the information.
32. The Council argued that this was particularly the case given its prior disclosures of information under FOIA about its investments. It noted that as part of its annual report and accounts it includes global figures on the success or failure of the private equity programme. Furthermore, it emphasised that it had already provided the complainant with the commitment, contribution, distribution and market value data of each fund in which it had invested dating back to 2000. The Council argued that such disclosures provided a significant degree of oversight and accountability of the level of monies being invested with particular managers and shows that the risks of those investments are being adequately managed by the Council over a period of time. The Council also argued that the data already disclosed would show where funds may be significantly underperforming year on year and allows for the scrutiny of the decisions by the Council to continue investing in such funds.
33. Consequently, the Council argued that it had therefore provided sufficient information to ensure transparency and accountability and given that disclosure would clearly undermine its confidentiality



obligations, it was correct to withhold the information under section 41. The Council also referenced a previous decision concerning the Governing Body of the University of Cambridge which it argued supported its position.<sup>2</sup>

34. The complainant argued that two previous decision notices issued by the Commissioner were directly relevant to this complaint and that in light of these decisions there was a compelling case for overriding the duty of confidentiality and disclosing the withheld information.<sup>3</sup> In these cases, the applicant sought 'a list of private equity, venture capital and real estate funds (including fund of funds)' to which the two pension funds in question were exposed. For each fund the applicant sought:
- details of the authority's commitment to the partnership;
  - the cumulative contributions made to date by the fund;
  - the cumulative distributions received to date by the fund; and,
  - the current value of the fund's interest in the partnership.
35. The two public authorities in question disclosed a list of the private equity, venture capital and real estate funds (including fund of funds) in which they were invested along with details of the level of commitment to the partnership. However, they sought to withhold the information sought by the latter three bullet points listed above either on the basis of section 41(1) and/or section 43(2) of FOIA. The Commissioner's decision notices concluded that although these exemptions were engaged, the public interest favoured disclosure of the withheld information.
36. The complainant argued that these two previous decisions provided the authority for the disclosure of aggregate private equity fund performance data. Consequently, in his view, the public interest favoured disclosure of the information he had requested regardless as to whether the Pension Fund had invested directly into individual private

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<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1002314/fs\\_50528576.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1002314/fs_50528576.pdf)

<sup>3</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2007/391832/DECISION\\_NOTICE\\_FS50086121.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2007/391832/DECISION_NOTICE_FS50086121.pdf) and [https://ico.org.uk/media/action-weve-taken/decision-notices/2007/389088/DECISION\\_NOTICE\\_FS50083667.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2007/389088/DECISION_NOTICE_FS50083667.pdf)

equity funds or had invested into individual funds via a fund of funds manager.

37. However, the Commissioner does not accept that these previous decisions provide a direct precedent for the disclosure of the information in this particular case. This is because in her view there is a distinction between the information that was sought in those cases and the withheld information which is the focus of this complaint: In the previous notices the Commissioner did not order the public authorities to disclose the performance data (and thus the identities of) the individual funds within which fund of funds had invested. Rather the notices only ordered the disclosure of performance data for any fund of funds and any individual funds which the pension funds had invested in directly. Therefore, if the Commissioner ordered the Council to comply with this present request he would be ordering the disclosure of a different type of information to that disclosed as a result of the previous decision notices. In essence, the Commissioner would be ordering the Council to reveal more about its private equity investments than that which was required by the public authorities subject to the previous decision notices, namely the composition of the funds within its funds of funds investments.
38. The different nature of the information, in the Commissioner's opinion, significantly affects the consideration of the public interest defence in this present case. Firstly, this is because disclosure of the withheld information in this case risks being detrimental to the fund of funds managers, an argument that was absent from the previous decision notices. Secondly, as the two notices cited by the complainant emphasise, numerous other public authorities had already disclosed similar information thus having a) the effect of undermining the two public authorities' claims that disclosure would be either prejudicial or detrimental and b) the effect of adding weight to the public interest in disclosure of the disputed information. Such factors cannot be said in this present case, because as the Commissioner has discussed above, she is not aware of any public authority that has disclosed similar information which the complainant is seeking access to it in this case. Furthermore, in the previous decisions the Commissioner emphasised the fact that the pension funds in question had only published very limited information about their private equity investments, whereas in this case, the Council has already disclosed more information about such investments.
39. In light of these differences, and taking into account the information disclosed by the Council to date about its private equity investments along with clear risk of detriment if this information was disclosed, the Commissioner has concluded that the public interest in disclosing the

information does not outweigh the public interest in maintaining the confidence.

40. In light of his findings in relation to section 41(1), the Commissioner has not gone on to consider the Council's reliance on sections 43(1) and 43(2) of FOIA.

## Right of appeal

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41. 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)

42. 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.
43. 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** .....

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
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**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**