

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 18 October 2016

Public Authority: City of Bradford Metropolitan District Council

Address: City Hall
Centenary Square
Bradford
BD1 1HY

Decision (including any steps ordered)

1. The complainant has requested information in relation to specific private equity funds invested in by the West Yorkshire Pension Fund. The Commissioner's decision is that the City of Bradford Metropolitan District Council has incorrectly applied both the exemption where disclosure would prejudice commercial interests at section 43(2) of the FOIA and the exemption for information provided in confidence at section 41 of the FOIA.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the requested information.
3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. Following the council's response as a result of the decision notice in case reference FS50589743¹, on 8 March 2016 the complainant made the following new request for information:

"In relation to the following funds only:

RisingStars Growth Fund II
Palatine Private Equity Fund II
Mezzvest III Fund
Growth Capital Partners Fund III
Equistone Partners Europe Fund IV E
Bridgepoint Europe IV
Barclays Integrated Infrastructure Fund

I request the data in the cells shaded green in the attached template.

I request it to be treated in severable fashion, one row at a time, up to but not exceeding the appropriate limit of £450.

(In other words, please start from the top of this sheet and work your way down, completing one row at a time, until the appropriate limit is reached)."

5. The council responded on 31 March 2016 and refused to provide the requested information citing the exemption at section 43(2) of the FOIA. It said that West Yorkshire Pension Fund (WYPF) believe that if quarterly cumulative figures are disclosed, it may prejudice the commercial interests of the council, the co-investors, the fund managers and the funds/companies in which it invests. It also said that disclosing this information potentially places it in breach of confidentiality clauses and exposes the confidential and sensitive trading activities of the general partner.

¹ https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1560444/fs_50589743.pdf The request was for quarterly data about WYPF private equity investments and the Commissioner's decision was that the council had incorrectly applied the exemption at section 21 of the FOIA.

6. On the same day the complainant requested an internal review. He stated that the refusal based on section 43(2) is in clear and obvious breach of the Tameside decision (FS50083667)².
7. The council provided an internal review on 27 April 2016 in which it maintained its original position and referred to the decision notice for case reference FS50588878³ which it said related to a similar request from another party.

Scope of the case

8. The complainant contacted the Commissioner on 28 April 2016 to complain about the way his request for information had been handled.
9. Referring to the terms of the request, the complainant confirmed that the 'data in the cells shaded green' is as follows:

Commitment
Cumulative Distributions
Cumulative Contributions
Market Value

The data was requested for each of the named funds, on a quarterly basis from 30 September 2013 to 31 March 2015.

10. On 19 August 2016, the Commissioner provided the council with the following preliminary assessment and asked the council to review the case and disclose the requested information.

"The council appear to be stating that the reasons for withholding information in the decision notice for FS50588878 apply in this case. I disagree with this position. I consider that the facts of FS50588878 differ significantly from this case in that the information requested in FS50588878 is much more detailed as it requests up to date information on a daily, weekly, and monthly basis, which could allow analysis of individual investments, whereas the request in this case is for aggregate fund-level private equity fund performance data on a quarterly basis.

² https://ico.org.uk/media/action-weve-taken/decision-notices/2007/389088/DECISION_NOTICE_FS50083667.pdf

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624029/fs_50588878.pdf

Although each case is decided upon its individual circumstances, I consider that this case is akin to that of FS50083667 (and subsequent similar decisions) and note that other public pension funds, for example Merseyside Pension Fund, disclose private equity fund performance data on an aggregated quarterly basis. I cannot see how a formal decision in this case would uphold the council's application of section 43(2)."

11. The council then telephoned the Commissioner and stated that the requested information is on website and sent the following link to that information:

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

The Commissioner pointed out that the information on the website is not exactly as per the terms of the request as it is on an annual basis rather than a quarterly basis and therefore the council must either provide the quarterly information as requested or provide full arguments as to why it is exempt from disclosure.

12. The council provided a written response stating that after revisiting this request it is maintaining its decision to withhold the information under the exemption set out in section 43(2) of the FOIA. Therefore the Commissioner has considered the application of the exemption at section 43(2) of the FOIA where disclosure would or would be likely to prejudice the commercial interests of any person to the following quarterly information from 30 September 2013 to 31 March 2015:

Commitment
Cumulative Distributions
Cumulative Contributions
Market Value

for each of the following funds:

RisingStars Growth Fund II
Palatine Private Equity Fund II
Mezzvest III Fund
Growth Capital Partners Fund III
Equistone Partners Europe Fund IV E
Bridgepoint Europe IV
Barclays Integrated Infrastructure Fund

13. The council's response also stated that it has considered section 41(1)(b) of the FOIA and that disclosure would constitute an actionable breach of confidence. Therefore, the Commissioner has also considered

the application of the exemption at section 41 for information provided in confidence to the requested information.

Background

14. The council provided the following as background information to this request:

“West Yorkshire Pension Fund (WYPF) is the third largest Local Government Pension Fund in the UK administering the Local Government Pension Scheme for approximately 250,000 members and providing pension services for over 350 employers. The LGPS is a statutory scheme and benefits are paid under the provisions of the Local Government Pension Scheme regulations. Bradford Metropolitan District Council is the administering authority for WYPF.

WYPF's entire investment portfolio is managed on a day-to-day basis by an in-house investment team, supported by the Fund's external advisers. Investment strategy and asset allocation is agreed at quarterly meetings of the Investment Panel. A long-term investment approach is taken which is consistent with the long-term nature of the liabilities of the Fund and as such, there is very little change from year to year in the Fund's underlying portfolio holdings.

WYPF annually publishes its investments as at 31 March following the annual audit process in September/October. This includes the private equity portfolio.

WYPF investment information and the report and accounts can be accessed via the Investments home page on the WYPF website at:

http://www.wypf.org.uk/Member/Investments/Investments_Home.aspx
[X](#)

Within the pension funds investment portfolio, the internal team invests a significant amount of money into private equity investment funds. These are typically limited partnerships managed by an investment manager on behalf of all the partners or contributors to the Private Equity fund, such as WYPF. The fund has a limited life and money is gradually drawn down as required to finance the purchase of individual assets and later distributed as the assets are sold.”

Reasons for decision

Section 43(2) – Prejudice to Commercial Interests

15. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
16. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43⁴. This comments that:

“...a commercial interest relates to a person’s ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.”
17. In this instance the council has applied section 43(2) to information relating to private equity funds invested in by WYPF. The Commissioner considers that the requested information does fall within the remit of section 43(2) FOIA.
18. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that 'likely to prejudice' means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. 'Would prejudice' places a much stronger evidential burden on the public authority and must be at least more probable than not.
19. In its submission to the Commissioner, the council said that commercial interests 'would be likely to be prejudiced' if the requested information is disclosed.
20. The Commissioner has considered how any prejudice to commercial interests would be likely to be caused by the disclosure of the requested information. This includes consideration of whether the prejudice claimed is "real, actual or of substance" and whether there is a causal link between disclosure and the prejudice occurring.
21. The council said that disclosure of the withheld information would be likely to prejudice the commercial interests of members, the council, as

⁴ https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

well as those of the fund managers and the funds/companies with which it invests.

22. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to obtain arguments from the third parties themselves. In her enquiries to the council, the Commissioner asked it to clarify on what basis it has established that disclosure of a third party's interests may occur and to provide copies of any correspondence the council has had with third parties in relation to this request.
23. The council provided the Commissioner with an email from an independent fund manager detailing reasons why that fund manager considers that disclosure of its detailed financial and commercial reports would prejudice commercial interests. The Commissioner notes that whilst the fund manager does manage funds for WYPF, the scope of the request does not include that particular fund. Therefore, whilst the points made may constitute general arguments for the application of the exemption, they are not specific to the actual information requested in this case.
24. The council said that the scope of this request for cumulative quarterly information is far broader than the request considered by the Commissioner in the FS50083667⁵ and FS50086121⁶ cases. In both those cases the requests were for the same information as this case (i.e. the Commitment, Cumulative Distributions, Cumulative Contributions and Value per fund) but 'as at the latest date now available' rather than on a quarterly basis. In FS50083667, the Commissioner's decision was that section 41 applied but the balance of the public interest test favoured disclosure and that section 43 did not apply and even if it did, the balance of the public interest test favoured disclosure. The decision in FS50086121 was that section 41 applied but the balance of the public interest test favoured disclosure.
25. The council submitted that the move to providing quarterly cumulative time series information is a significant step forward in detail and is far more likely to provide an insight into commercially sensitive trading activity, even at a summary level. It said that:

⁵ https://ico.org.uk/media/action-weve-taken/decision-notices/2007/389088/DECISION_NOTICE_FS50083667.pdf

⁶ https://ico.org.uk/media/action-weve-taken/decision-notices/2007/391832/DECISION_NOTICE_FS50086121.pdf

"Due to the limited number of assets held within a single fund, Individual trades may be materially apparent from quarterly cumulative data which may graphically reveal the underlying value of acquisitions and disposals made by the fund. This, in our view, goes beyond the fund summary level information required under the IC decision FS50083667 and threatens the commercially sensitive details of the Funds trading activity and the value of its underlying assets...

... WYPF is one of several co-investors who invest alongside commercial organisations, as opposed to a collection of other local authorities or members of the general public. If any more detailed cumulative information than annually is disclosed, by virtue of an FoIA request, the concern is that the Private Equity managers will be reluctant to enter into future business agreements with WYPF."

26. The complainant pointed out that the Commissioner considered the issue of disclosure of aggregate level fund performance data in the aforementioned cases of FS50086121 and FS50083667 almost a decade ago and that since that time, public sector investors in the UK have responded by increasing transparency and disclosing data on their fund performance. He said that almost all of the public sector bodies that he knows of in the UK report this data on a quarterly basis (as this reflects the quarterly capital account statements they receive) and that there has been no negative consequence of this at all.
27. The complainant also said that the request is largely for historical data whereas in the aforementioned case of FS50588878 the request was for the "most up to date" information held by the Fund which would invariably have included highly confidential capital drawdown and distribution notices (which may be much more frequent than quarterly). He said that, for the avoidance of doubt, such information is acknowledged to be highly confidential and does not form part of his request. Typically, he would expect WYPF to provide data that is at best six months out of date, as the most recent data he would expect to receive would be 30 September 2015 aggregate numbers, even though WYPF will already be in possession of the 31 December 2015 reports and will shortly receive the 31 March 2016 reports.
28. In addition, the complainant drew the Commissioner's attention to the fact that WYPF are an investor in a private equity fund called "Bridgepoint Europe IV" and that this forms part of the information request. He said that in the state of Washington, public authorities are required to disclose data and have been doing so on an aggregate

quarterly basis since 2002 and that a public authority called the "Washington State Investment Board" are also an investor in Bridgepoint Europe IV and on their website they publish the aggregate fund performance data for this fund each quarter.⁷ The complainant also provided the Commissioner with examples of UK based pension funds that disclose the data on their websites⁸ and UK based pension funds that disclose the data on request. The Commissioner notes that Merseyside Pension fund provided the data for two funds it invests in which are subject to this request, those being RisingStars Growth Fund II and Palatine Private Equity Fund II. The Commissioner considers that the disclosure of equivalent information by other pension fund providers weakens the council's argument that disclosure would harm commercial interests.

29. In relation to the council's argument that managers will be reluctant to enter into future business agreements with WYPF, the complainant has said that since the aforementioned decisions in FS50083667 and FS50086121, UK public investors have invested more into private equity than they did in any previous years. He commented that the fact that some people want to keep private equity private does not mean that fund managers are likely to turn down a cheque of £20 million (the typical investment size of WYPF) when the opportunity arises.
30. The Commissioner's guidance on 'The Prejudice Test'⁹ states that;
- "If an authority claims that prejudice would be likely to occur they need to establish that
- there is a plausible causal link between the disclosure of the information in question and the argued prejudice; and
 - there is a real possibility that the circumstances giving rise to prejudice would occur, ie the causal link must not be purely hypothetical; and

⁷ http://www.sib.wa.gov/financial/invrep_ir.asp

⁸ http://www.berkshirepensions.org.uk/bpf/downloads/download/5/freedom_of_information
http://www.nespf.org.uk/Investment/inv_managers.asp

⁹ https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf

- the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote.”
31. The Commissioner does not consider that the explanations given by the council (at paragraph 25) sufficiently demonstrate a causal link between the disclosure of the withheld information and the prejudice to commercial interests. It has not been sufficiently explained why fund level information at quarterly intervals would be more likely to provide an insight into commercially sensitive trading activity than the published annual information, particularly given the explanation that a long-term investment approach is taken; which is consistent with the long-term nature of the liabilities of the fund. Neither has it been adequately explained how individual trades may be apparent from quarterly cumulative data when the data requested is at fund level and made available on an annual basis.
32. The Commissioner does not consider that the council has linked the alleged consequences to the specific circumstances of the case and does not consider that the arguments presented are sufficiently detailed to demonstrate the adverse effect. She considers that it is for public authorities to fully explain the relevant causes and effects.
33. The Commissioner considers that the council has been given sufficient opportunity to provide evidence and arguments in support of its position. When making enquiries in this case, the Commissioner informed the council that she will give a public authority one opportunity to justify its position to her before issuing a decision notice. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exemptions are engaged, the Commissioner is not obliged to generate arguments on a public authority's behalf or to provide the causal link. The lack of sufficient arguments from the council, and the fact that other pension funds disclose equivalent data, has led the Commissioner to the conclusion that section 43(2) of the FOIA is not correctly engaged in this case.

Section 41(1) Information Provided in Confidence

34. This exemption provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.
35. The extent of the council's submission on section 41 was as follows:
- “The Council has also considered Section 41(1)(b) of the Act to withheld this information as it is provided in confidence with the evidence from Private Equity Manager email attached. It is our view that disclosure of this information would constitute an actionable

breach of confidence and so disclosure would also be unlawful under the Act. In these circumstances, Section 41 of the Freedom of Information Act confers an absolute exemption on disclosure and there is no public interest test to apply.”

Was the information obtained from another person?

36. In deciding whether information has been ‘obtained from any other person’, the Commissioner will focus on the content of the information rather than the mechanism by which it was imparted and recorded.
37. As stated above, the council has said that the information ‘...is provided in confidence...’. Although the Commissioner acknowledges that some of the requested information, that being the ‘Cumulative Distributions’, ‘Cumulative Contributions’ and ‘Market Value’, is likely to have been obtained from the fund managers, she does not consider that the ‘Commitment’ would have been obtained from another person as it relates to commitments made to the funds by WYPF.

Actionable claim for breach of confidence

38. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark* [1969] RPC 41. According to the decision in this case a claim for breach of confidence can be established where:

“... three elements are normally required if ... a case of breach of confidence is to succeed. First, the information itself ... must ‘have the necessary quality of confidence about it’. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it...”
39. All three elements must be present for a claim to be made. However, for that claim to be ‘actionable’ within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.
40. As noted above, the council did not submit any arguments as to why disclosure would constitute an actionable breach of confidence. Whilst the Commissioner can deduce that the information is likely to have been communicated in circumstances importing an obligation of confidence and may have the necessary quality of confidence, it is not immediately apparent that unauthorised disclosure would cause a specific detriment

to either the party which provided it or any other party. This is particularly so given the finding in relation to section 43(2) above that the council has not sufficiently demonstrate a causal link between the disclosure of the requested information and the prejudice to commercial interests.

41. As stated above in relation to the exemption at section 43(2), the Commissioner considers that the council has been given sufficient opportunity to provide evidence and arguments in support of its position. When making enquiries in this case, the Commissioner informed the council that she will give a public authority one opportunity to justify its position to her before issuing a decision notice. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the Commissioner is not obliged to generate arguments on a public authority's behalf. The lack of sufficient arguments from the council, and the fact that other pension funds disclose equivalent data, has led the Commissioner to the conclusion that section 41 of the FOIA is not correctly engaged in this case.

Right of appeal

42. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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
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