

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 28 September 2006

**Public Authority:** Wolverhampton City Council.  
**Address:** Civic Centre  
St. Peter's Square  
Wolverhampton  
WV1 1SH

### Summary

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The complainant requested information on the investments made by the Council in its role as the administrator of the West Midlands Pension Fund, (the "WMPF"). 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), and that a disclosure would be likely to prejudice the commercial interests of some of the parties involved, (section 43). 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 also believes that a disclosure would not prejudice the commercial interests of any party.

### The Request

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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 West Midlands Metropolitan Authorities has an investment:*
  2. *For each such fund a note of (as at the latest date now available):*
    - a. *West Midlands Metropolitan Authority's commitment to the partnership,*
    - b. *The cumulative contributions made to date by the West Midlands Metropolitan Authorities.*
    - c. *The cumulative distributions received to date by the West Midlands Metropolitan Authorities, and*
    - d. *The current value of the West Midlands Metropolitan Authority's interest in the partnership, and*



## Chronology

7. The Commissioner wrote to the Council on the 21 April 2005. In that letter he initially questioned whether the WMPF was a public authority for the purposes of the Act, and asked for the relevant information to be supplied.
8. The Council responded to the Commissioner on the 9 May 2005 stating that it held title to the information due to the Local Government Reorganisation (Designated Council) (Pensions) Order 1986. This says that all rights and liabilities for a local government pension fund rest with the administering authority for the fund. In the case of the WMPF the administering authority is Wolverhampton City Council.
9. The Council did not provide the information requested by the Commissioner, however it did supply a number of letters from investment companies, which reminded the Council that any information it received was confidential and should not be disclosed. The letters included comments from investment companies stating that any disclosure of the information could substantially prejudice future investments, to the point where the fund may be excluded from investing in some of the higher return funds by fund managers. The letters also included extracts of confidentiality clauses previously agreed by the parties.
10. 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 the case

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11. The Commissioner has established that although the WMPF is not directly caught within the scope of the Act, Wolverhampton City Council is a public authority. It is responsible for administering the fund, and holds all information in its own right under the Local Government Reorganisation (Designated Council) (Pensions) Order 1986. It was therefore under a duty to respond to the request.

## Analysis

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

## Procedural breaches

13. There are no procedural breaches other than the failure to supply the information under section 1 of the Act.

## Exemptions

14. **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 or a third party could take the authority to court.
15. The Commissioner has examined the confidentiality clauses which seek to bind the authority to hold any information it receives from the investment companies in confidence. He recognises that this investment information supplied to the council may be exempt from disclosure under section 41 of the Act
16. However the Commissioner does not accept that a confidentiality clause will necessarily 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.
17. 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 information therefore needs to be considered under the exemption in section 43 of the Act, (see paragraphs 48 – 61 below).
18. As regards parts 2(c) - (e) 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.
19. The specific confidentiality clauses in the contractual agreements certify that an obligation of confidence was created when the contracts were signed. The first criterion is therefore met. In this case the information is about financial payments and returns on investments made by the Council on behalf of the pension scheme members. It is not therefore trivial or insignificant. Furthermore the Commissioner notes that disclosure of similar information in other jurisdictions has attracted legal action and political and statutory intervention in the past.

20. As regards the general availability of this kind of information, 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 in the public domain. 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.
21. The Commissioner's decision is therefore that the information has the quality of confidence necessary for a duty to be owed.
22. 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.
23. There are no issues surrounding consent, law, or crime in this case. This leaves a consideration of the public interest. The Commissioner must therefore balance the public interest in disclosing the information against the public interest in maintaining the duty of confidence, with a view to deciding if the duty of confidence should be maintained.

#### The pension fund

24. The Local Government Pension Scheme 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 WMPF does not directly affect the pension rights of individuals who are members of the scheme.
25. 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.
26. *The stated aims of the Fund are to:*
  - *Enable employer contribution rates to be kept as nearly constant as possible and at reasonable cost to the taxpayers, scheduled and admitted bodies having regard to the liabilities*
  - *Manage employers' liabilities effectively through regular review of contributions and additional contributions for early retirements which lead to a strain on funding.*
  - *Ensure that sufficient resources are available to meet all liabilities as they fall due.*

- *Maximise the returns from investments within reasonable risk parameters.*

### Private Equity Investment

27. 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.
28. Pension's 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.
29. 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 IRR 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.
30. 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. Such 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.
31. 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 the fund, but provides details on the overall investment into, returns from, and current value of the fund itself; it provides an overview of the current performance of the fund.

32. Whilst this information is not as commercially sensitive as information about the portfolio companies the fund has invested in, the Commissioner has noted the argument that it may still prove detrimental to the 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.
33. The Commissioner also notes the 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.

### The public interest

34. The central tenet for the public interest in disclosing information in this case lies in the 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. There is therefore a strong public interest in the disclosure of information on the investment of public funds, 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. A disclosure of information on the performance of individual funds would therefore contribute to ensuring the effective oversight of the level of public funds being invested in such funds and show that the risks associated with such investments are being adequately managed by the Council.
37. 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.

38. 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 be considered whether this would create a greater burden on tax payers by being detrimental to the Councils ability to maximise its fund through its investment management.
39. 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.
40. The Commissioner has considered:
- whether there is a possibility that disclosure could divulge information which could allow competitors to track the investment strategies of the fund manager,
  - that the information is possibly sensitive, and that it may provide an unreliable view of the performance of the funds.

In considering these arguments he has however also taken into account the evidence provided by the complainant that such 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.

41. 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 manager of a fund 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.
42. The Commissioner cannot accept an argument that public bodies may be excluded from investing in the more successful funds should this information be disclosed. Accepting this as a valid argument for non disclosure leaves open the possibility that rights and obligations under the Act could be undermined by companies willing to take such action.
43. 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.

44. The Commissioner therefore considers that the likelihood of any commercially sensitive information being disclosed by this information is limited. He has balanced the likelihood of this against the strong public interest in transparency and accountability in the expenditure of public funds. 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. Given the higher risk associated with such investments, the Commissioner considers that the public interest lies in allowing greater scrutiny of the investment levels and returns the Council is obtaining in its management of these functions.
45. 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.
46. 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.
47. 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.

### **Section 43**

48. Section 43 of the act provides an exemption to disclosing information where disclosure would prejudice the commercial interests of any person. This exemption is subject to a public interest test.
49. The Council argues 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.

50. The request in 2(b) asks for the cumulative contributions made to date by the WMPF 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 arguments considered earlier in paragraphs 34 to 44 are relevant to the application of the exemption in section 43 also. 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.
51. However the Commissioner has taken into account the fact that the complainant has requested fund level information rather than information on portfolio companies. As discussed previously, 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.
52. The requests in sections 2(b) – (e) 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.
53. However the complainant has provided evidence that many organisations provide or 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 concern.
54. In addition, the authority is able to state that interim results may give a misleading picture of the likelihood of the overall success of the fund at the end of its term. There is, in any event, already an understanding within the investment community that interim results on such funds are not always a reliable indicator of the likely final full term value of the fund, particularly in results from the early years of the fund.
55. The Council has also stated that if it discloses the requested information it 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 may be disclosed by those bodies in response to an FOI request. It is questionable whether this will occur. A number of other public sector organisations disclose information of this sort on a regular basis, and only very few authorities from other jurisdictions have publicly been excluded from investing with specific fund managers as a direct result of such disclosures.
56. 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 this information

- would result in prejudice to any parties, particularly given the limited nature of the information being disclosed.
57. The Commissioner does not therefore accept that the prejudice test under section 43 has been satisfied. The Commissioner's decision is therefore that the information falling within the scope the request should be disclosed.
58. Although the Commissioner's decision in this case is that the exemption in section 43 is not engaged, he believes that the counter arguments are strong, and considers the arguments on both sides finely balanced. Because of this the Commissioner has also considered how the case would be decided if the exemption was engaged. Section 43 is a qualified exemption which requires that a public interest test is carried out where the exemption is engaged. This is in order to decide whether the information should be disclosed even though prejudice is likely to occur. The test is whether the public interest in disclosing the information outweighs the public interest in maintaining the exemption.
59. Although the Commissioner recognises that the public interest test applicable within the law of confidence is different to that applicable in section 2(2)(b) of the Act, in this case however many of the points above are relevant to the test in section 43. The Commissioner has therefore decided that, for the reasons provided in paragraphs 34 to 46 above, the greater public interest rests in disclosing the information requested.
60. The Commissioner's decision is therefore that the information should be disclosed.

## The Decision

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61. The Commissioner's decision is that the public authority has not dealt with the request for information in accordance with the Act.

## Steps Required

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

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66. 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](mailto: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 28th day of September 2006**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**