

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 October 2010

Public Authority: Department for Work and Pensions
Address: Adjudication and Constitutional Issues
Department of Work and Pensions
2nd floor
The Adelphi
1 – 11 John Adam Street
London
WC2N 6HT

Summary

The complainant requested from the Department of Work and Pensions any information about any funding it provided to the Leeds City Credit Union. The authority confirmed that it held information but withheld it from disclosure on the basis that section 43(2) (commercial interests) applied. On review it confirmed that decision.

The Commissioner's decision is that the Department for Work and Pensions was correct to apply the exemption in section 43 to the information and that the public interest in maintaining the exemption outweighs that in disclosing the information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 24 September 2009 the complainant requested the following information from the Department of Work and Pensions (the 'DWP'):

“Under the terms of the FOI Act, I request the information the DWP holds on its financial support to the Leeds City Credit Union to help it stave off financial collapse during the last year. This should include, but not exclusively, recorded information, including correspondence between the two parties on this issue or with Leeds City Council.”

3. The DWP responded on 11 November 2009. It stated that the information was being withheld on the basis that section 43 applied.
4. On the same day the complainant asked the DWP to review its decision.
5. On 9 December 2009 the DWP responded, stating that the information was exempt for the same reasons.

The Investigation

Scope of the case

6. On 15 December 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information he requested should have been provided to him.

Chronology

7. The Commissioner wrote to the DWP on 25 January 2010 and informed it that a valid complaint had been received.
8. On 22 February 2010 the DWP wrote back to the Commissioner providing him with the information which he had requested, together with further arguments in support of its position.
9. On 2 June 2010 the Commissioner wrote to the DWP again, asking it specific questions relating to its application of section 43 to the information.
10. The DWP responded on 1 July 2010 providing that information.

Findings of fact

11. Credit Unions are financial co-operatives owned and controlled by their members. A Credit Union has a 'common bond' which determines who can join it. The common bond may be for people living or working in the same area, people working for the same employer or people who belong to the same association, such as a church or trade union. The Commissioner understands that Credit Unions exist, in part, to provide credit for members of the community who may find it difficult to obtain credit from high street banks and other mainstream lenders.
12. The Leeds City Credit Union (the 'LCCU') started life in 1987 as the Leeds City Employees Credit Union, serving a common bond of current and retired employees. It changed its name to the Leeds City Credit Union Ltd in 1996 and in 2001 it expanded its common bond to include everyone who lives or works in the Leeds Metropolitan District.
13. The Credit Union is regulated by the Financial Services Authority which is also responsible for monitoring its performance.
14. A series of articles was published in the Yorkshire Post newspaper alleging mismanagement of the Credit Union.
15. Further stories relating to the financial status of the Credit Union were published in the press in June 2009. These referred to a "hole" in the credit union's finances and speculated that this had required emergency funding to ensure its continued viability. The press speculated that Leeds City Council and others agreed to input emergency funding into the Credit Union to support it. One of the other parties mentioned was the DWP.
16. In response the LCCU issued a statement indicating that members who had savings with LCCU should not be concerned as all savings below £50 000 were insured and not under threat. Further stories have been printed on intermittent occasions since that time, mostly relating to allegations relating to the former Chief Executive of the Credit Union.

The Growth Fund

17. The Commissioner notes that the DWP's relationship with the LCCU revolves around the delivery of the 'Growth Fund'. The Chancellor's Pre-Budget Report in December 2004 set up a Growth Fund to increase the availability of affordable personal loans via third sector (not-for-profit) lenders such as credit unions.

18. The DWP administers the Growth Fund. Lenders bid to deliver the Growth Fund (affordable lending) service within deprived areas throughout England, Scotland and Wales. Currently the DWP holds Growth Fund contracts with 87 organisations including the LCCU.
19. These not-for-profit organisations already play a key role in the provision of affordable loans, and are active in providing this as well as money advice to those on the lowest incomes without encountering difficulties with repayments. However, they need a larger capital base in order to grow, to provide services to promote financial inclusion and become sustainable. The Growth Fund is there to help them overcome the barriers they face in improving their services and offering increased coverage.

Analysis

Substantive Procedural Matters

20. Section 10 (1) of the Act requires that a public authority must comply with its obligations under section 1(1) of the Act promptly, and in any event not later than the twentieth working day following the date of the receipt of the request.
21. The complainant made his first request for information on 24 September 2009 but did not receive a refusal notice until 11 November 2009. The DWP therefore breached section 10(1) of the Act by failing to confirm it held information relevant to the request within the 20 working day period provided in section 10 of the Act.
22. In its refusal notice of 12 December 2007 the DWP did not provide the complainant with details of the public interest test which it had carried out once it had decided that section 43 was engaged.
23. Section 17(3) places an obligation upon the public authority to provide a reason for its decision. The Commissioner considers that the DWP's refusal notice failed to state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information and providing reasons for that being the case.
24. The Commissioner has therefore concluded that it breached section 17(3) of the Act in failing to supply a notice compliant with the requirements of that section within 20 working days. It also breached

section 17(1) by failing to issue a refusal notice within 20 working days.

25. The Commissioner's decision is that the DWP breached section 17(3) of the act in failing to provide the complainant with adequate reasons for its decision to apply section 43. It failed to provide the complainant with details of the public interest test it had carried out.

Exemptions

Section 43

26. The DWP claim that the information is exempt because section 43(2) of the Act applies. Section 43(2) provides that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

27. The DWP applied the test that disclosure "would be likely" to affect the commercial interests of the LCCU. The DWP also claims that a disclosure of the information would be likely to prejudice its own commercial interests. The Commissioner notes that the DWP provided evidence of the prejudice which was likely to occur to the LCCU in the form of a written submission from the LCCU itself. The Commissioner would have been unlikely to accept arguments purely from the DWP relating to the prejudice it foresaw at the LCCU.
28. The LCCU is a not for profit organisation however its activities are carried out in a competitive commercial market. It competes against private providers which seek to make a profit from providing credit facilities, such as banks and building societies. It also seeks to compete against doorstep lenders and loan sharks to draw individuals away from lending from unregulated or disreputable credit providers.
29. The DWP's argument is that a disclosure of the information would be likely to cause prejudice to the LCCU's commercial interests by damaging its members and prospective member's confidence in it.

Standard of proof

30. Where the public authority has claimed that disclosure is only likely to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), *'the chance of*

prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk'.

31. The Commissioner's interpretation of 'would be likely to prejudice' in section 43 cases is that there should be evidence of a significant risk of prejudice to a person's commercial interests. The degree of risk must be such that there 'may very well' be prejudice to those interests. Whether prejudice exists or not is decided on a case by case basis.

Prejudice

32. Following the Information Tribunal's decision in Hogan v ICO (EA/2005/0026, EA/2005/0030), the Commissioner uses a three step test to indicate whether prejudice would or would be likely to occur from the disclosure of the information in question.

1. identify the prejudice in the exemption
2. consider the nature of the prejudice in question
3. consider the likelihood of the prejudice in question occurring

1. The applicable prejudice within section 43

33. The DWP argues that disclosure would be likely to prejudice the commercial interests of the LCCU by damaging consumer confidence in its ability to be an attractive organisation with which to save, and lend money. Although carried out on a not for profit basis, the LCCU is a commercial service provided in competition with banks, building societies and other forms of saving and credit lending organisations. Hence any damage to consumer confidence in the LCCU would damage its commercial competitiveness against those businesses.

2. The nature of the prejudice in question

34. The DWP argues that a disclosure of the information would have led to further press stories about its problems and that that would have further heightened consumer concern about the Credit Union at a time when consumer confidence in financial institutions was already at a low degree. Damaging consumer confidence in the LCCU would be likely to have led to existing members withdrawing their funds from the LCCU or prospective new members deciding not to join it.
35. The DWP has provided a statement made by very senior employees of the LCCU highlighting that previous stories run by the press regarding its problems resulted in commercial damage being caused. It states that as a result of press articles its members began to lose confidence in the LCCU and that this affected its commercial standing. It therefore

argues that a re-emergence of the stories through a disclosure of this information would result in a further loss of confidence and a loss of reputation. The stories would be repeated and the issues brought back into the public eye. This would further prejudice the commercial interests of the LCCU

36. The DWP's argument is therefore that a disclosure of the information would cause prejudice to the LCCU's commercial interests by damaging its reputation, together with its members' and prospective members' confidence in it, and that in doing so this would lessen its attractiveness to members and prospective customers.
37. The Commissioner has considered this, and other arguments highlighting the prejudice which would be likely to occur. He is however unable to elaborate on these arguments further within this Decision Notice because he refers directly to information which the DWP has sought to exempt from disclosure.
38. The arguments are therefore held in a confidential schedule which will be provided to the DWP in order to further explain the Commissioner's reasoning behind his decision on this case.

3. The likelihood of the prejudice in question occurring

39. The Commissioner has taken into account the letter which was sent to the DWP by the LCCU arguing that commercial damage occurred when previous stories were published in the complainant's and other newspapers. It argued that further press stories would be likely to cause a greater loss of confidence and reputation in the LCCU and that this would be likely to cause commercial loss compared to its competitors.
40. The Commissioner is satisfied that a disclosure of the information at the time of the request would have been likely to prejudice the commercial interests of the LCCU. Although some press stories had already been published in newspapers, the level of detail held in this information was available only to those directly involved and a resurgence of doubt about the vigour of the LCCU would have been likely to dent consumer confidence in it. Due to the nature of the information it would be likely to cause further prejudice to the commercial interests of the LCCU if it were disclosed. Again this is examined further in the confidential schedule to this Decision Notice.
41. The Commissioner notes that the DWP also claimed disclosure would prejudice its own commercial interests. However he has not considered

this in any depth as it is clear to him that the exemption is engaged on the basis of prejudice to the LCCU alone.

The public interest test

The public interest in maintaining the exemption

42. Section 43 is a qualified exemption which requires that a public interest test is carried out to ascertain whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
43. The main public interest in maintaining the exemption in this case lies in the ability of organisations such as the LCCU to have free and frank discussions with the DWP and other public authorities where it is in the interests of their members (and the community) to do so. It is in the public interest of voluntary and not-for-profit organisations such as the LCCU to be able to disclose facts and figures about its commercial standing to the DWP as it would be otherwise be unable to gain its support. Conversely the DWP would not be able to enter into contracts to allow credit unions to deliver the Growth Fund project without obtaining the means to properly oversee the use of the funds by the parties which wish to deliver it.
44. In order to be able to work in the current approach the DWP will often need to access full and frank information about an organisation's financial standing and its trading/business levels and strategies prior to providing it with public funds. It needs to do this to ensure that it exercises diligence when providing public money, and ensuring that the most appropriate decisions are taken and the fund best meets its intended purposes.
45. Information which may be required to fulfil such a role might include extremely sensitive information such as details about the situation which was being reported on, information on the current lending strategies and how effective they are, details of the current state of trading at the LCCU and details of forward looking business estimates and costs.
46. The Commissioner considers that in reality, the LCCU could not submit such information to the DWP if there was likelihood that that information might be disclosed more widely within a relatively short period of time. The LCCU put itself into a potentially disadvantageous position by providing information to the DWP, and this may have detrimental consequences to it if that information was disclosed in response to a request.

47. A disclosure of detailed financial and commercial information would have weakened the LCCU's competitive edge, providing a means for its competitors to seek to undermine it and acquire some of its market share within the city. The Commissioner recognises that the LCCU trades in a market where the majority of its competitors are commercial banks and building societies which seek to make a profit, unlike the LCCU. He also recognises the competitiveness of that particular market.
48. It is important to emphasise that the DWP's priority was the delivery of the Growth Fund. It did not necessarily have to continue to rely upon the LCCU as a provider if it identified other, better suited means to achieve its target. If it was unable to obtain the information it required in order to properly supervise the delivery of the Growth Fund it may have decided that the LCCU (or other credit unions) were not suitable to deliver Growth Fund monies. If it could not find an appropriate provider, who was able to share the information it needed to ensure proper oversight of the use of the funds then it may not have been able to deliver Growth Fund to that area at all.
49. The LCCU would therefore have been aware that there was no certainty that the DWP would continue its contract with the LCCU to deliver the Growth Fund if the security of the funds it provided was in question. To assure itself that this was the correct course of action the DWP would have required information on the current circumstances at the LCCU. The LCCU would also know that it had to allow access to this information if it wanted to continue to deliver the Growth Fund to the area.
50. It is therefore also in the public interest that the LCCU could provide the information and that the DWP can have access such information. If it could not then it would be unlikely to be able to properly oversee the use of the Growth Fund and it is questionable whether it could then enter into partnerships of this sort with credit unions in the future. It would then need to seek alternative ways in which to deliver the benefits of Growth Fund money to the community.
51. Central aspects of public interest which relate to maintenance of the exemption lie in the context of the LCCU's commercial activities in areas of the community where there is a particular need.
52. The Commissioner recognises that the DWP would understand that many LCCU members would not have been able to obtain credit through these means without the LCCU. In its absence they may have needed to resort to doorstep lenders to provide services instead. The

LCCU is also one of the largest credit unions in the country with thousands of active members. Clearly therefore the existence of LCCU projects and its lending facilities plays an important role in the Leeds community. A loss of the Growth Fund contract would have a wide and significant impact, often upon those with the most need for such facilities.

53. The state of the market at the time of the request was that credit was difficult to obtain under any circumstances. As the LCCU's aim was partially to provide a service to those who could not otherwise obtain credit from formal or regulated lenders, as was the Growth Fund, these circumstances came to light at a time when its services were probably most required by the community.

The public interest in disclosing the information

54. The central public interest in disclosing the information rests in creating transparency and greater accountability in the LCCU's relationship with the DWP under the circumstances. It has been reported that the LCCU needed a significant input of public funds in order to sustain it, but very little information has been provided to explain whether the DWP took action in response to the situation, and if so, how it did so.
55. The DWP did not provide any detail to the complainant as to what, if anything, it did about the LCCU's reported situation, other than to clarify to him its Growth Fund administration duties. It has not been clear about whether or if it supported the LCCU and if so, how it did so. The complainant has stated however that the LCCU accounts show that the DWP did provide support to it.
56. Clearly a DWP decision to use, or risk public funds in any way should be as transparent as possible. It should be accountable for that decision and allow scrutiny of the actions it took if at all possible. The complainant has pointed out that this holds greater emphasis given the financial deficit which the country faces and the Commissioner agrees with that statement.
57. There is also a further public interest in information being disclosed which would highlight any checks and balances which the DWP took before making decisions relating to the LCCU. This would raise public confidence in the DWP's financial management and in its administration of the Growth Fund.
58. There is also a public interest in information on the management of the LCCU and the state it was in being disclosed. The press stories suggested that there were serious difficulties at the LCCU, and its remit

made it an important provider of services to those with most need in the Leeds area. It provided services with the backing of public authorities, often from public authority sites and buildings. If the LCCU required further funding from public funds it is in the public interest for taxpayers to know how and why that position was reached.

Balance of the public interest

59. The Commissioner has considered all of the above factors and it is his decision in this case that the public interest in maintaining section 43 outweighs the public interest in disclosing the information in this instance. Although he recognises the strong public interest in information about the actions taken by the DWP being disclosed, the nature of the information would mean that its disclosure would be likely to have a detrimental affect on the LCCU, and hence on its ability to deliver the Growth Fund. Given the nature of the Growth Fund he finds that the greater public interest rests in safeguarding its delivery to those who most need it within the community.
60. If disclosure of this information resulted in a prevention or a reduction in its ability to do that then this would be a significant step backwards in terms of the wider context of social inclusion within the city.
61. The Commissioner's decision is therefore that the DWP was correct to withhold the information under section 43 of the Act.

The Decision

62. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The DWP was correct to withhold the information under section 43(2) of the Act.
63. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - The DWP breached section 10(1) of the Act in failing to respond to the complainant's request within 20 working days.
 - The Commissioner's decision is that the DWP breached section 17(3) of the Act in failing to provide the complainant with adequate reasons for its decision to apply section 43. It failed to

provide the complainant with details of the public interest test it had carried out.

Steps Required

64. The Commissioner requires no steps to be taken.

Right of Appeal

65. 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
Arnhem House
31, Waterloo Way
LEICESTER
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

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

Dated the 11th day of October 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 43(2) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."