

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 February 2011

Public Authority: Government Actuary's Department
Address: Finlaison House
15-17 Furnival Street
London
EC4A 1AB

Summary

Organisations, tendering to provide services under a Public Private Partnership or Private Finance Initiative, must provide actuarial confirmation that employees transferring from the public to the private sector would have pensions provided by them that were at least broadly comparable to those they had in the public sector. This confirmation, from the public authority, is colloquially known as a "GAD passport". The complainant requested a list from the public authority of those organisations that had or were seeking a GAD passport. The public authority withheld this requested information by reference to sections 41 and 43 of the Act. The Commissioner's decision is that the public authority had correctly applied section 41 to withhold 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.

Background

2. Broadly speaking those organisations tendering to provide services under a Public Private Partnership or Private Finance Initiative are

required to offer employees, who would transfer from the public to the private sector, pension arrangements that were broadly comparable. The Government Actuary's Department (GAD) advises Government departments, NHS employers and local authorities on the adequacy of the pension arrangements being proposed as to their broad comparability. However a certification of broad comparability need not only be issued by the public authority as it can also be issued by any appropriately qualified actuary. Thus the fact that an organisation provides services under a Public Private Partnership or Private Finance Initiative does not mean that that their certification of broad comparability was necessarily GAD issued.

The Request

3. The complainant, on 26 June 2009, requested from the public authority the following information;
 - (A) A list of all organisations both voluntary and commercial that hold current valid GAD Passports issued for the transfer of Principal Civil Service Pension Scheme Members.
 - (B) A list of all organisations both voluntary and commercial that have applications pending for GAD Passports for the prospective transfer of Principal Civil Service Pension Scheme Members.
4. On 23 July 2009 the public authority informed the complainant that whilst it did hold the information requested it was exempt from disclosure by virtue of sections 41 (information provided in confidence) and 43 (commercial interests) of the Act.
5. On 17 August 2009 the complainant requested that the public authority review its decision. On 3 September 2009 the public authority informed the complainant that they had undertaken the requested review and its outcome was to uphold the original decision.

The Investigation

Scope of the case

6. On 16 September 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

7. The Commissioner commenced his preliminary investigation, on 5 October 2009, by asking the public authority to provide him with a copy of the withheld information and a detailed explanation of its reliance on the exemptions. By way of a letter dated 30 October 2009 the public authority provided the Commissioner with a copy of the withheld information. It also explained that those on the withheld list would be averse to the list being made public. It stated that the reason for this is that disclosure would inform competitors as to their business activities and therefore would be detrimental to them.
8. Due to the high volume of complaints received by the Commissioner in relation to public authorities' handling of requests under the Act, there was regrettably a delay before he could continue his investigation on this case.
9. The Commissioner, in a letter dated 30 July 2010, asked the public authority, *inter alia*, to provide evidence that the withheld information was received in confidence. By way of reply, dated 17 August 2010, the public authority provided an extract from the service level agreement ("SLA") between it and those seeking a GAD passport. The extract was as follows:

"Each of GAD and the Client shall safeguard all confidential information belonging to the other party and shall not disclose any confidential information belonging to the other party to any other person without the prior written consent of the other party, except to such persons and to such extent as may be necessary for the performance of this SLA."
10. On 8 October 2010, the Commissioner contacted the complainant and informed him that, in his view, the information had been correctly withheld under the aforementioned exemptions. The Commissioner explained his reasoning for this and asked the complainant if, in light of this, he wished to withdraw his complaint. However the complainant subsequently responded to the Commissioner, refusing to withdraw.
11. On 7 January 2011, the Commissioner wrote to the public authority to seek evidence and/or arguments originating from at least some of the organisations that will suffer a prejudice/detriment if the withheld information was released. He did this in order to investigate whether the public authority may be willing to disclose parts of the information it may consider to be less commercially sensitive. However, in its

response dated 28 January 2011, the public authority stated the following:

“Given the number and diverse range of third parties potentially affected, we do not, as a matter of routine, seek the views of these parties on the question of disclosure. We do not, therefore hold, at this point, arguments specifically on this issue from a number of the affected parties. However, as explained in earlier correspondence, for the reasons stated the information provided by those seeking passports is given in confidence, with the clear understanding that GAD will maintain that confidence unless appropriate authorisation is sought and given. These terms on which information is given and treated provides important evidence as to a third party’s perspective on the likely damaging effect of disclosure on their commercial interests.”

Analysis

Exemptions

Section 41 – Information provided in confidence

12. Section 41(1) of the Act provides that information is exempt if (a) it was obtained by the public authority from any other person and (b) if the disclosure would constitute an actionable breach of confidence. The exemption is “absolute” and therefore not qualified by the public interest test set out in section 2 of the Act.
13. As the requested list constitutes information extracted from that provided by those seeking a GAD passport, the Commissioner is satisfied that (a) is met. He therefore next considered whether (b) was also met.
14. For the purposes of assessing claims to an actionable breach of confidence in respect of commercial information, the Commissioner considers that it is appropriate to adopt the test set out in *Coco v A N Clark (Engineers)*[1968] FSR 415. This sets out that a breach will be actionable if:
 - The information has the necessary quality of confidence;
 - The information was imparted in circumstances importing an obligation of confidence; and

- There was an unauthorised use of the information to the detriment of the confider.

Quality of confidence

15. Information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
16. The Commissioner is of the view that the information, especially having considered the reason it is held by the public authority as set out above, can certainly be considered as not trivial.
17. Regarding the accessibility of the information, the Commissioner has not been able to discern any publicly available information as to the companies that have applied for a GAD passport. The Commissioner does note that a list of organisations with a Private Finance Initiative agreement is available¹. However, it cannot be properly assumed that an organisation providing services under a Public Private Partnership or Private Finance Initiative necessarily has a GAD issued certification of broad comparability since such certification can be issued by any appropriately qualified actuary. Additionally, it also cannot be assumed that an organisation in a Public Private Partnership or a Private Finance Initiative agreement must have had a valid certification of broad comparability. This is because the Commissioner understands that a certification of broad comparability can lapse, be revoked or suspended. Therefore at the time of the information request an organisation providing services under a Public Private Partnership or Private Finance Initiative may have ceased to hold a valid certification of broad comparability whether issued by the public authority or otherwise.
18. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

Obligation of confidence

19. Even if information might otherwise be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation may be expressed explicitly or implicitly.
20. Having regard to the extract from the SLA laid out above, the Commissioner notes that there is an explicit obligation of confidence between the public authority and those organisations whose names

¹ <http://www.partnershipsuk.org.uk/PUK-Projects-Database.aspx>

constitute the withheld information. In terms of the wording of the SLA, the Commissioner believes it is reasonable to conclude that an organisation applying for a GAD passport would conclude that the explicit obligation of confidence contained in that agreement extends to the name of their organisation as well as any information supplied regarding their application.

21. In addition, also having regard to the SLA, the Commissioner does not believe that the public authority should have to seek the written consent of each organisation contained within the withheld information for their names to be disclosed before determining whether section 41 can be applied. The Commissioner is also satisfied that disclosure of this information under the Act would not constitute disclosure “to such persons and to such extent as may be necessary for the performance of this SLA”.
22. The Commissioner is therefore satisfied that the information gives rise to the necessary obligation of confidence to those organisations contained within it.

Detriment to the confider

23. Although in *Coco v Clark* the matter of triviality is dealt with as a separate issue to detriment, it can clearly be seen that the two are linked in that the more trivial a piece of information is, the less likely its disclosure would have a detrimental impact on the confider. As mentioned above, in this case the Commissioner is strongly of the view that the information is not trivial.
24. As explained, the public authority asserts that disclosing the organisations that constitute the withheld information would be detrimental to those organisations.
25. Specifically, the public authority stated that the divulging of the list could be commercially damaging to the companies contained within it. It explained that this is because the mere fact that a company has or is applying for a GAD passport could indicate to a company’s competitors that they were about to bid for a contract with a government department that necessitated them having a GAD passport. Conversely, the fact that a company had renewed a GAD passport may again indicate to a company’s competitors what their intention was in relation to an existing contract with a government department.
26. The Commissioner accepts that those private sector organisations who engage the public authority to issue a passport would, by disclosing this fact to their competitors, be detrimented by this disclosure of their

commercial activities and interests. He accepts the argument that these competitors could then be able to so order their affairs to compete more competitively against GAD passport holders with a probable or likely resulting financial loss to GAD passport holders. For example a new application could tip off rival bidders that a particular contractor was preparing to bid for a specific contract. Rival bidders could then use this knowledge (about intention to bid for a contract rather than pension comparability arrangements per se) to adjust their bid to achieve a competitive advantage.

27. The Commissioner is of the view, however, that the public authority's position in relation to detriment would have been further strengthened if it actually had representations from some or all of the third parties (i.e. the organisations contained within the withheld information) as to the likely detriment they believe they would suffer as a result of disclosure of the requested information. However the Commissioner accepts that such evidence is not always a prerequisite to establishing detriment, and in this case he is prepared to accept the public authority's arguments regarding detriment as being reasonable. The Commissioner is also persuaded by the public authority's contention that, in this case, the terms on which this information is given and treated provides important evidence as to a third party's perspective on the likely damaging effect of disclosure on their commercial interests.
28. The Commissioner therefore finds that releasing the information would constitute a detriment to the confider. When combined with his findings in relation to quality and obligation of confidence, the Commissioner therefore concludes that disclosure of the information would be a basis of a claim for a tortious breach of confidence and that prima facie it would be successful².

Public interest defence

29. However to determine more fully if such a claim would be successful the Commissioner next considered whether there would be a viable defence of public interest to an action for breach of confidence.
30. As the exemption for information provided in confidence is an absolute exemption there is no public interest test to be applied under the Act. However, in deciding whether the exemption applies it is necessary to consider whether an actionable breach of confidence would be sustainable before a court. This is because case law on the common

² Higher Education Funding Council for England (HEFCE) & Guardian News and Media Ltd (Information Tribunal , EA/2009/0036)

law concept of confidence suggests that a breach of confidence will not succeed in circumstances where a public authority can rely on a public interest defence.

31. The duty of confidence public interest test assumes that the information should be withheld unless the public interest defence in disclosure exceeds the public interest in maintaining the confidence.
32. The Commissioner notes there is a public interest in openness, accountability, transparency, public understanding and public debate in general, which extends to knowledge about the public authority's issuing of GAD passports and the organisations to which they relate. This is the case because matters regarding pension arrangements of employees transferred from a public sector employer to a private one under a Private Finance Initiative or Public Private Partnership are legitimate matters for such scrutiny.
33. However, as regards the specific information withheld, it is the Commissioner's view that there are no unique or specific factors that carry any particular weight favouring the release of the information in the public interest that would give rise to such a defence to an action for a breach of confidence.
34. The Commissioner takes the view that a duty of confidence should not be overridden lightly. Disclosure of any confidential information undermines the principle of confidentiality itself which depends on a relationship of trust between the confider and the confidant. It is the Commissioner's view that people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected.
35. As to the specific circumstances of this matter, the Commissioner recognises the value of companies being able to confide in GAD and what would be the consequence if they stopped doing so. To illustrate, the Commissioner accepts that confidentiality would be an operative factor for companies when choosing an actuary to issue a certificate of broad comparability. In addition, if GAD were hampered by not being able to provide the confidentiality of its competitors it would also be less competitive in its commercial activities; any resulting loss of income would also be an indirect loss to the public purse (the public authority charges organisations for the provision of this service).
36. The Commissioner's decision is, for the reasons expressed above, that the public authority would not have a credible defence to an action for breach of confidence were it to disclose the requested information under the Act. Accordingly he finds that if any action for a claim of

breach of confidence were pursued it would, on the balance of probabilities, be successful.

Section 43 – Commercial interests

37. Having found that the withheld information was properly withheld by virtue of section 41(1) the Commissioner need and did not go on to consider the applicability of section 43(2).

The Decision

38. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

39. The Commissioner requires no steps to be taken.

Right of Appeal

40. 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 21st day of February 2011

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him

Information provided in confidence

Section 41(1) provides that –

“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.”

Commercial interests

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

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).”