

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 June 2011

Public Authority: Capital for Enterprise Ltd (CfEL)
(an executive agency of the Department
for Business innovation and Skills)

Address: 1 Broadfield Close
Broadfield Business Park
Sheffield
South Yorkshire
S8 0XN

Summary

The complainant made a request to Capital for Enterprise Limited (CfEL) for information relating to Enterprise Capital Funds (ECFs). CfEL refused to provide this information to the complainant as it stated it was exempt from disclosure under section 41 and section 43(2) of the Freedom of Information Act 2000 (the "Act"). The Commissioner considers that the section 43(2) exemption was correctly engaged in this case. The Commissioner did not therefore go on to consider CfEL's application of section 41.

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. Capital for Enterprise Limited ('CfEL') is a professional asset management company. It is also the UK Government's centre of

knowledge, expertise and information on the design, implementation and management of finance measures to support Small and Medium Size enterprises ('SMEs') across the UK.

3. The request in this case is for information relating to ECFs. On the Department for Business Innovation and Skills (BIS) website, <http://www.bis.gov.uk/policies/enterprise-and-business-support/access-to-finance/enterprise-capital-funds>, it states that:

"Enterprise Capital Funds (ECFs) address a market weakness in the provision of equity finance to SMEs (small and medium sized enterprises) by using Government funding alongside private sector investment to establish funds that operate within the 'equity gap'. An equity gap arises where businesses with viable investment propositions are unable to attract investment from informal investors or venture capitalists. In bridging this gap, ECFs aim to alleviate what would otherwise present a significant barrier to enterprise and to productivity growth. Nine such funds have been launched since 2006."

4. The Commissioner is aware that BIS/CfEL must be able to attract organisations to manage an ECF.
5. The Commissioner is aware that SMEs may contact one of the nine Investee Fund Managers to apply for funding.
6. An ECF is partly funded by the Government and partly through private investment. The Government does expect a return for the funding it provides.

The Request

7. The Commissioner notes that under the Act CfEL is not a public authority itself, but is actually an executive agency of the Department for Business Innovation & Skills (BIS) which is responsible for CfEL and therefore, the public authority in this case is actually BIS and not CfEL. However, for the sake of clarity, this decision notice refers to CfEL as if it were the public authority. BIS has however dealt with the Commissioner on CfELs behalf in this case.

8. The complainant made a request to CfEL on 6 December 2009. The request was as follows:

"From Part 3(x) (page 23) of the document "Enterprise Capital Funds, Guidance for Prospective Managers, March 2009"

<http://www.capitalforenterprise.gov.uk/files/Guidance%20for%20Prospective%20ECF%20Managers%20-%20V2.pdf>

"The Government is additionally interested in the impact of ECFs upon equity gap investments into SMEs. Therefore the ECF will be expected to provide some additional reporting on SMEs seeking investment...A business seeking investment from an ECF will be required to provide the ECF with an Investee Summary Sheet containing: Company Name, Company Postcode, Management Team, Companies House Company Registration Number...etc.

"...Information relating to specific funds or businesses will be passed to external parties only where required by law..."

Under the Freedom of Information Act 2000 law, please may I be sent:

copies of all the "Investee Summary Sheets" received by the government and its wholly owned subsidiary CfEL so far, and

a copy of the master spreadsheet or database into which information from these sheets is keyed in."

9. On 21 January 2010 BIS responded on behalf of CfEL to the request. It confirmed that it held the Investee Summary Sheets but refused to disclose this information as it stated that it was exempt from disclosure under section 43(2) of the Act. It did not confirm whether it held a master spreadsheet.
10. As the complainant was dissatisfied with the response he had received, on 21 January 2010 he asked for an internal review to be conducted.
11. On 2 June 2010, on behalf of CfEL, BIS wrote to the complainant with the result of the internal review it had carried out. It upheld

its application of section 43(2) in relation to the Investee Summary Sheets the complainant had requested but still did not confirm whether or not it held a master spreadsheet. It did direct the complainant to other information which related to the request which it felt he may be interested in.

The Investigation

Scope of the case

12. On 26 June 2010 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 the following points:
 - To determine whether BIS was correct to withhold the Investee Summary Sheets.
 - To obtain a response from BIS in relation to the request for a master spreadsheet or database.
13. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - BIS provided the complainant with a response in relation to the request for a copy of the master spreadsheet or database. It confirmed that this information was not held.

Chronology

14. On 7 August 2010 the Commissioner contacted BIS to ask for a copy of the Investee Summary Sheets and for confirmation of the exemptions BIS believes are applicable and why.
15. On 14 September 2010 BIS responded to the Commissioner. It provided a sample of Investee Summary Sheets. It confirmed that it believed section 43(2) and section 41 were applicable in this case and provided submissions in support of these exemptions.
16. On 19 January 2011 the Commissioner contacted BIS to ask it to provide the complainant with a response to the part of the

- request for a master spreadsheet or database. In relation to the part of the request for the Investee Summary Sheets, he asked BIS for further submissions in support of its application of section 41 and section 43(2).
17. On 21 February 2011 BIS responded to the Commissioner. It explained that it had now responded to the complainant in relation to the part of the request for the master spreadsheet or database. It explained to the complainant that this information was not held. In relation to the request for the Investee Summary Sheets, it provided further submissions in relation to its application of section 41 and section 43(2). It explained that whilst it considered that section 40(2) may apply to some of the information contained within the Investee Summary Sheets it wished to rely on section 41 and 43(2).

Findings of fact

18. BIS put together an Equity Fund information sheet in response to this request which provides aggregate information about the investments broken down by region and sector. This can be accessed at:

<http://www.capitalforenterprise.gov.uk/files/Website%20update%20July%202010.pdf>

This provides information as to the business sector and region to which equity fund investments are being made. The withheld Investee Summary sheets contain a business description as well as a postcode for the company which applied for investment. By putting together the Equity Fund information sheet BIS wished to provide some information relating to the types of businesses and the regions in which investments are being provided under the ECF fund, aggregated with information relating to other government supported equity funds. Whilst this does not directly answer the complainant's request it goes some way to providing further information relating to this issue.

Analysis

Exemptions

Section 43(2)

19. Section 43(2) 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. The full text of section 43 can be found in the Legal Annex at the end of this Notice.
20. In this case BIS has stated that disclosure of the requested information would be likely to prejudice the commercial interests of BIS and CfEL and the SMEs that have been considered for finance under the ECF programme.
21. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the commercial interests of BIS, CfEL or the SMEs that have been considered for finance under the ECF programme.
22. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his awareness guidance on the application of section 43. 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."
23. The Commissioner has also noted guidance issued by the Scottish Information Commissioner in relation to commercial interests and section 33(1)(b) of the FOI (Scotland) Act 2002. This guidance states that,

"...commercial interests will specifically relate to any commercial trading activity it undertakes, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment."

24. The Commissioner considers that applying for funding from the ECF programme to enable SMEs to expand and develop their respective businesses relates to the commercial interests of each of the SMEs which have applied for such funding.
25. The Commissioner therefore believes that the withheld information falls within the scope of the exemption.
26. The Commissioner therefore went on to consider how any prejudice to the commercial interests of the SMEs which applied for ECF programme would be likely to be caused by the disclosure of the Investee Summary Sheets.
27. In support of its use of this exemption BIS has contacted three of the nine ECF Fund Managers. The Fund Managers have explained that disclosure could disadvantage the commercial interests of the companies which have applied for funding. Disclosure would put information into the public domain relating to successful companies business strategies. In relation to unsuccessful companies the Fund Managers have suggested that customers, suppliers and other potential funders may view the company in a negative light if it was not able to attract ECF funding. Four investee SMEs were also contacted and the four SMEs agreed with the views of the Fund Managers.
28. The Commissioner is mindful of the Tribunal's decision in *Hogan v Oxford City Council* EA/2005/0026 EA/2005/0030 in which it was commented that, "Second the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and prejudice and the prejudice is, as Lord Falconer of Thoronton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected." The Commissioner has therefore sought to determine whether the prejudice claimed is "real, actual or of substance".
29. The Commissioner is also mindful of the Tribunal decision in the case of *Derry City Council v the Information Commissioner* EA/2006/0014. In this case the Council argued that the commercial interests of a third party, Ryanair, would be likely to be prejudiced if the requested information were disclosed. The Council did not ask Ryanair for its views as to whether it believed its commercial interests would be likely to be prejudiced nor did

- Ryanair present any evidence to the Tribunal. The arguments put forward by the Council to the Commissioner as well as to the Tribunal were based upon the Council's thoughts on the point and not on representations made by Ryanair. In the absence of any evidence from Ryanair the Tribunal stated that it was unable to conclude that Ryanair's commercial interests would be likely to be prejudiced.
30. The Commissioner acknowledges that in this case BIS did contact some Fund Managers and investee SMEs for its views in relation to this.
 31. BIS has therefore based its submissions on its own and CfELs experience in this area as well of that of the Fund Managers and the investee SMEs.
 32. BIS has also explained that if potential investee SMEs believed that the information that is provided to the Fund Manager at the time that funding is requested would be made publicly available, then the SMEs would be reluctant to use the programme as a way to access finance and may see it as a last resort. The effect would be that the ECF programme would be unable to attract enough good propositions to balance its returns potentially making the programme unviable.
 33. BIS has also provided the Commissioner with evidence of similar prejudice occurring in a comparable situation. BIS explained that a named Capital for Enterprise Fund portfolio company, suffered adverse publicity as a result of voluntary disclosure of information that related to the company by a Fund Manager. This is another fund similar to the ECF programme which receives some investment from the government. It explained that the disclosure resulted in damage to the fund and the investee company. In the aftermath of the press coverage, it stated that there was significant disruption to the business and diversion of management resources to reassure customers and other stakeholders as to the businesses viability. In addition following press scrutiny surrounding this investment there was a noticeable aversion by investee companies for it to be a matter of public record that they had received funding from the Capital for Enterprise Fund as they wanted to avoid similar scrutiny of their business and because there was clear reputational risk of undergoing such scrutiny. The Commissioner considers that whilst this relates to a different funding programme and different information was disclosed, this example provides some evidence

- as to the nature of the prejudice claimed occurring in this case. This is because the SMEs which apply for ECF investment are private companies which may not wish to come under public scrutiny and therefore may be deterred from applying for such funding programmes.
34. The Commissioner considers that the ECF programme is an important source of investment for SMEs. He acknowledges that the programme has been set up in order to plug an equity gap, as discussed in paragraph 3 above, for SMEs which may struggle to obtain funding from elsewhere. However the Commissioner does not consider that because an SME may struggle to obtain funding from elsewhere that this would necessarily mean that an SME would apply for funding despite the issues set out at paragraph 32 and 33 above. An SME may simply decide not to expand and develop its business or in other cases an SME may ultimately cease trading due to its reluctance to apply for funding through the ECF programme due to the scrutiny it may have to endure in order to obtain it. The Commissioner would note that SMEs are private companies which generally do not endure or expect this level of public scrutiny. The Commissioner is therefore persuaded that SMEs may be deterred from seeking funding through the ECF programme if the Investee Summary Sheets were disclosed.
35. Furthermore, after viewing a sample of the withheld information and the submissions of the Trust Fund Managers BIS contacted as well as the investee companies contacted, the Commissioner is also persuaded that disclosure would put information into the public domain relating to successful companies' business strategies. BIS has argued that for those businesses which are successful in their ECF application, the investors summary sheets state explicitly what the invested capital is intended for and how much, which it believes is commercially sensitive information and has strong potential to surrender the businesses trading positions and business and market strategies. The Commissioner considers that this would provide the relevant SME's competitors with information which may give those competitors a commercial advantage.
36. In relation to unsuccessful companies the Fund Managers have suggested that customers, suppliers and other potential investors may view the company in a negative light if it wasn't able to attract ECF funding. BIS stated that where a Fund

Manager has taken the decision not to invest in a company it will be because there is a risk which is so great as to lead the Fund Manager to decide that it should not invest. There are a number of reasons why this might be, the Fund Manager might consider that the company's product is not marketable, that it might be too expensive to develop, that the management does not have the necessary skills and experience to take the company forward, that there might be licensing issues, and so on. BIS has explained that whatever the issue was there will be a fundamental reason why the business was not backed which will be inferred from that decision. The Commissioner is also persuaded that unsuccessful companies could be viewed in a negative light which could potentially detract other funding prospects and/or cause customers/suppliers to become wary.

37. Finally in this case BIS has argued that disclosure of the requested information would be likely to prejudice the commercial interest rather than would prejudice the commercial interests. Therefore the threshold to prove would be likely to prejudice is lower than if BIS had claimed that the commercial interests would be prejudiced. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
38. Upon viewing the evidence provided by BIS the Commissioner considers that the prejudice to the commercial interests of the SMEs which apply for ECF investment would be likely to be prejudiced and therefore section 43(2) is engaged in this case.
39. As section 43(2) is engaged in this case the Commissioner will go on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

40. The Commissioner considers that the following public interest arguments favour disclosure:

- Disclosure would promote openness and transparency in relation to the types of SMEs obtaining ECF funding.
 - Disclosure would promote openness and accountability in terms of where public money is being invested.
 - Disclosure may enable the public to oversee that ECF investment is being granted fairly and consistently.
41. The Commissioner considers that there is a strong public interest in the process of ECF fund investment being open and transparent and that the government is accountable for the money it invests in such funds. Furthermore he considers that there is a public interest in the process of ECF investment being provided fairly and consistently.

Public interest arguments in favour of maintaining the exemption

42. The Commissioner considers that the following public interest arguments favour maintaining the exemption:
- SMEs employ a significant number of the population and contribute significantly to the economy¹. It is therefore in the public interest for SMEs to feel able to utilise the ECF programme to develop and expand as SMEs provide employment to a significant number of the population and contribute significantly to the UK economy.
43. The Commissioner considers that there is a strong public interest in SMEs seeking to obtain investment through the ECF programme as SMEs employ a significant number of the population and therefore opportunities to develop and expand are vital in order to enable SMEs to continue to provide these employment opportunities. Furthermore the Commissioner considers that there is a strong public interest in SMEs having the fullest opportunities to grow, develop and prosper as they are a vital element of the UK economy.

¹ http://stats.bis.gov.uk/ed/sme/Stats_Press_Release_2009.pdf

Balance of the public interest arguments

44. The Commissioner considers that there is a strong public interest in the ECF programme being open and transparent, in terms of fairness of the process and also in terms of how public money is being invested.
45. However whilst the Commissioner considers that there is a strong public interest in openness and transparency in this case, he has attributed significant weight to the argument that disclosure may have a negative impact upon SMEs applying to the ECF programme for funding. If SMEs were deterred from applying for this vital opportunity for growth and expansion those SMEs may be unable to expand and grow or ultimately cease trading. As SMEs provide such a significant amount of employment this would not be in the public interest. The Commissioner considers that there is an extremely strong public interest in encouraging and supporting the growth and development of SMEs as this benefits a significant number of the population.
46. Upon considering all of the public interest arguments the Commissioner considers that the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.
47. As the Commissioner has found that section 43(2) was correctly engaged in relation to the Investee Summary Sheets he has not gone on to consider BIS's application of section 41.

Procedural Requirements

Section 10

48. Section 10(1) of the Act provides that:-

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."
49. The Commissioner has considered whether or not BIS complied with section 10(1) of the Act.

50. BIS failed to comply with section 1(1)(a) within the statutory time for compliance, therefore it breached section 10(1) of the Act in its handling of the request.

The Decision

51. 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:

- It correctly applied section 43(2) in order to withhold the Investee Summary Sheets.

52. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- It breached section 10(1) in its handling of this request.

Steps Required

53. The Commissioner requires no steps to be taken.

Other matters

54. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

55. 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

56. 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.
57. 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 June 2011

Signed

**Graham Smith
Deputy Commissioner
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."

Time for compliance

Section 10 provides that -

"(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4)The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.

(5)Regulations under subsection (4) may—

(a)prescribe different days in relation to different cases, and

(b)confer a discretion on the Commissioner.

(6)In this section—

- “the date of receipt” means—
 - (a) the day on which the public authority receives the request for information, or
 - (b) if later, the day on which it receives the information referred to in section 1(3);
- “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Commercial Interests

Section 43 provides that -

“(1)Information is exempt information if it constitutes a trade secret.

(2)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).

(3)The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”