

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2018

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

Decision (including any steps ordered)

1. The complainant requested information relating to private equity funds from the City of Wolverhampton Council ("the council"). The council provided some information but said that it did not hold some of the information. The complainant disputed this position. During the Commissioner's investigation, the council highlighted that due to the passage of time, figures sought by the complainant were now available and had been published online. At this point, the complainant said that he did not accept that the council had provided all the information he had requested and clarified the scope of his complaint. The council acknowledged that it did hold the further information sought however it said that it would be too burdensome to provide it all at once and that it was to be published as part of an ongoing publication schedule. The council confirmed that it would wish to rely on the exemption under section 22 of the Freedom of Information Act 2000 ("the FOIA"). The Commissioner has found breaches of section 1(1)(a), 10(1), 17(1) and 17(1)(a), (b) and (c).
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Provide a refusal notice to the complainant in accordance with the obligations under section 17(1) of the FOIA. Appropriate rationale for any exemption relied upon should be supplied directly to the complainant including any relevant public interest test considerations. The refusal notice should relate to the request dated 14 March 2017 read in the context of the earlier requests dated 30 September 2016 and 14 November 2016.

3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 30 September 2016, following ongoing correspondence and requests with the council about private equity funds, the complainant requested information from the council in the following terms:

"Please provide the information as requested in the table below (Appendix B) for all of the private equity funds listed in Appendix A on a quarterly basis from inception to the most recently available quarter.

Please provide this information to me in the form of an excel table. Template listed below (Appendix B).

Appendix A

*Carlyle Europe Partners IV
Corpfin Capital Fund III, L.P
ECI 8, L.P
ECI 9
Exponent PEP II
Graphite Capital Partners VII
IK VII
Astorg IV*

Appendix B

All in original currency of each respective fund

*Fund name
Commitment
Contributed since inception
Unfunded (remaining commitment)
Distributed since inception
NAV
Reference Quarter (date)"*

5. On 14 November 2016, the complainant wrote again to the council and requested information in the following terms:

"For the following funds (Part A), please can you make sure that the date is up to 30/06/2016?"

Altor Fund III, L.P.
BC European Captial VIII, L.P
Doughty Hanson & Co. V, L.P.
HG Capital 6
Industri Kapital 2007 Fund
Astorg IV
Corpfin Capital Fund III, L.P
ECI 8, L.P
ECI 9
Exponent PEP II
Graphite Capital Partners VII
IK VII

For the following funds (Part B), please can you provide the whole data set to 30/06/2016:

Graphite Capital Partners VIII
The Triton Fund III
Bridgepoint Europe IV
Permira V
Permira IV, L.P.
Primary Capital III
SEP III
Montagu IV, L.P."

6. The council replied on 30 January 2017 and provided a link to where current fund information could be accessed online. It also provided another link to what it referred to as "historic data".
7. The complainant replied on 6 March 2017. He said that he was happy with the historic data provided however he said that the current information provides "an adjusted NAV [Net Asset Value]". He said that he wanted the actual NAV. He also said that the current information did not pick up exactly where the historic information left off.
8. The council replied on the same day. It said that it did not hold this information. It said that the fund had provided an "adjusted" NAV relating to more current information because it does not hold actual NAVs for a considerable amount of time due to fund managers having to calculate the values.
9. On 14 March 2017, the council provided further clarification. It said the following:

"It has quite rightly been ascertained that the NAV information provided in both sets of data is based on different data sources i.e. historical data is provided from the fund managers reports, and the

*'new data' is an assumption based on the most recent fund manager report together with cash flows since that date
Unfortunately there is no way around this problem unless [complainant's name] is happy to receive the 'new data' at a much later date i.e. when we have received all of the valuations from the fund managers...*

The information used by the Fund Manager to confirm the NAV relate to asset values which we don't hold at the time the NAV is produced (we reconcile as part of the annual reports and accounts)".

10. On the same day, the complainant responded by making a new request as follows:

"I hereby alter my request to focus on the following funds only:

<i>Actis Emerging Markets 3</i>	<i>Part Comp</i>
<i>Altor Fund III, L.P.</i>	<i>Part Comp</i>
<i>Astorg IV</i>	<i>Part Comp</i>
<i>BC European Capital VIII, L/P</i>	<i>Part Comp</i>
<i>Bridgepoint Europe IV</i>	
<i>Corpfm Capital Fund III, L.P.</i>	<i>Part Comp</i>
<i>Doughty Hanson & Co. V, L.P</i>	<i>Part Comp</i>
<i>ECI 8, L.P.</i>	<i>Part Comp</i>
<i>ECI 9</i>	
<i>Exponent PEP II</i>	<i>Part Comp</i>
<i>Franciso Partners II, L.P.</i>	<i>Part Comp</i>
<i>Graphite Capital Partners VII</i>	<i>Part Comp</i>
<i>Graphite Capital Partners VIII</i>	<i>Part Comp</i>
<i>HG Capital 6</i>	
<i>IK VII</i>	<i>Part Comp</i>
<i>Industri Kapital 2007 Fund</i>	<i>Part Comp</i>
<i>Montagu IV, L.P.</i>	
<i>Permira IV, L.P.</i>	
<i>Permira V</i>	
<i>Primary Capital III</i>	
<i>SEP III</i>	
<i>The Triton Fund III</i>	
<i>Thomas H. Lee Parallel Fund VI, L.P."</i>	

11. He requested an internal review on 10 April 2017. He said that he did not accept that the information requested was not held.
12. The council completed its internal review on 11 May 2017 and said that it wished to maintain its position that the information was not held. The council said that the level of skill, knowledge and judgement required would amount to the creation of new information.

Scope of the case

13. The complainant contacted the Commissioner on 12 May 2017 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council held the information sought as requested on 14 March 2017. The Commissioner initially understood from the complainant that he was happy with the historical information provided and was seeking only to complain about the current information that the council said it did not hold at the time of the request.
14. During the Commissioner's investigation and because of the passage of time, the council accepted that the information described as "current" information at the time of the request was held at the date of the Commissioner's investigation albeit that it maintained that it was not held at the time of the request on 14 March 2017. The Commissioner has not reached a conclusion on whether or not the information was held at the time of the request because he considers that the passage of time has resulted in the informal resolution of this issue. Whatever the case may have been at the time of the request, the fact is that this information is held by the council now and the Commissioner understands that it has been published by the council.
15. The complainant clarified during the Commissioner's investigation that he remained of the view that the council had not provided the historical information he had requested and he asked the Commissioner to consider this aspect too, which the Commissioner agreed to do.

Reasons for decision

Section 1(1) – General right of access

16. Section 1 of the FOIA provides a general right of access to recorded information held by public authorities. Public authorities have a general duty to state whether the requested information was held and if so, to provide it.
17. In this case, the complainant disputed the council's position that the information requested was not held. Where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the evidence and argument provided by both the public authority and the

complainant. For clarity, the Commissioner is not expected to prove categorically whether the information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities".¹

18. By way of background, the council has explained that following the abolition of West Midlands County Council on 31 March 1986, the functions, including the administration of the West Midlands Pension Fund ("the Fund") were devolved to the seven West Midlands metropolitan district councils. As part of this process, the council became the administering body of the Fund under the Local Government Act 1985. The council has clarified that the Fund is not a legal body in its own right and all contracts and assets are held in the council's name. For the purposes of the Data Protection Act 1998 and the FOIA, the council maintains overall responsibility for the functions performed by the Fund.
19. The council further explained that in its role as administering authority the council is required to invest contributions received from employers and fund members in order to provide future benefits. When investing those contributions the council takes a long term and diverse approach to its investments, investing in markets across a number of asset classes (e.g. property and infrastructure to global equities and government gilts). To do this it requires the expertise of investment managers (fund managers) who invest the contributions on behalf of the council. They in turn provide information as to the value of those investments (assets) which help the council to determine how much funding (contributions) is needed to meet the liabilities of its fund members' benefits. The value of the investments is referred to as the NAV [Net Asset Value].
20. To produce a NAV, a fund manager needs access to information around the current market value of the various assets that they hold. As the fund managers involved in this request will invest directly in a wide range of businesses (rather than equities), this information will be very complex and require calculation by a professional in this area. Due to the complexities required, not to mention the wide range of investments that are made by the council, the council explained that it would be impossible for the council to try and calculate the NAV for each fund and instead relies on the final NAV figure reported by fund managers.

¹ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

21. The council said that fund managers provide the council with the information usually within 120 days from the end of each quarter, however, this cannot be guaranteed and at the time of the request the information had not been provided by the fund managers. Only estimated values were available for what was referred to as "current" information (information within the last 12 months). The council said that when complying with previous requests from the complainant, it had provided an "adjusted NAV" figure received. This had been calculated using the last NAV data received with cash movements since that date factored in. This produces a very simplistic estimated figure.
22. In this case, the council initially said in its internal review that the level of skill, knowledge and judgement required in this case to respond to the request would amount to the creation of new information. The Commissioner clarified with the council that this statement referred only to "current" NAV information, that is to say information relating to the last 12 months. The council explained that because of the passage of time, the current information that it said was not held at the time of the request, was held by the time of the Commissioner's investigation because this had since been received from the fund managers. The Commissioner's understanding is that this information has also since been published so the Commissioner has treated this particular matter as having been informally resolved.
23. Following the resolution of the above issue, the complainant said that he remained dissatisfied because the council had not provided the "historic" information referred to, that is to say information earlier than the last 12 months since the request. This information may date back to 2008. The complainant explained that his request dated 14 March 2017 needed to be read in the context of earlier requests and take into account that he was also asking for information corresponding with table headings that were submitted to the council as part of an earlier request made on 30 September 2016. Those headings were as follows:
 - Contributed since inception
 - Unfunded
 - Distributed since inception
24. Following consideration of the context of the request under consideration dated 14 March 2017, the Commissioner decided to accept that the request was also capable of covering the information described by the complainant above and he asked the council to clarify its position regarding this information.
25. At this point, the council said that it had misunderstood what the complainant was asking for on 14 March 2017 and had thought that the issue was limited to current NAV figures, hence the statement

made that the information was not held. It clarified that it did hold the information referred to as historic information. It said that the complainant's desire to access this information had formed part of long running series of requests between itself and the complainant. It said that this had resulted in a refusal made under section 12 of the FOIA (compliance would exceed the costs limit of £450) initially. The council explained that the complainant subsequently formed new requests to ensure that the cost limit was not exceeded.

26. The council said that its position regarding this information now was that it was exempt under section 22 of the FOIA (information intended for future publication). The council explained that the Fund had determined a schedule of publication for the quarterly performance figures of its assets. The council said that this is quite a complex and time consuming process.
27. Given that the council's position has changed substantially at a late stage in the Commissioner's investigation because of a misunderstanding about the nature of the precise information being sought, the Commissioner has decided to order the council to produce a new refusal notice clarifying its position.

Procedural issues

28. Section 1(1)(a) and 10(1) provide together that a public authority should confirm whether requested information is held within 20 working days. This did not happen on this occasion and so the Commissioner has found breaches of these obligations.
29. The council confirmed that it would wish to rely on the exemption under section 22 of the FOIA. When an exemption is relied upon, public authorities are obliged to supply a refusal notice in accordance with the obligations under section 17(1) within 20 working days. As this did not happen, the council breached section 17(1) and 17(1)(a), (b) and (c) of the FOIA.

Right of appeal

30. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Elizabeth Archer
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF