Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 February 2008

Public Authority: Harrow Council
Address: Civic Centre
PO Box 57
Station Road
Harrow
HA1 2XF

Summary

The complainant requested information on the commission payments made by investment managers on behalf of Harrow Council ("the Council"). The Council supplied the names of its investment managers however claimed that the remainder of the information was exempt on the basis that the exemptions in section 43(2) (commercial interests) and section 41 (information held in confidence) applied. The Commissioner's decision is that the exemption in section 43 was engaged by the information however the public interest in disclosing the majority of the information overrides the public interest in maintaining the exemption. He also decided that the exemption in section 41 was partially applicable, however the public interest defence inherent in the common law of confidence also meant that a disclosure of the majority of the information would not be actionable in law. The exemption was not therefore engaged by this information. The Commissioner's decision in this case is that the information should be disclosed to the complainant, with minor redactions.

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. The Commissioner has seen that the issues raised by the subject matter of this request are in all material respects identical with that in 36 other matters, brought by the same complainant against 36 separate public authorities. The request for

information made by the complainant to each public authority was identical. In his earlier decision, ICO reference FS50155391 ("the lead decision"), the Commissioner found largely in favour of the complainant, and ordered disclosure of the requested information, following the redaction of a minor amount of requested information. The Commissioner's reasoning in reaching a conclusion in this matter is identical; accordingly this Notice does not repeat that reasoning, but should be read alongside the lead decision. For ease of reference, the lead decision is appended to this Decision Notice at Appendix 1.

The Request

3. On 19 July 2006 the complainant requested the following information from the Council:

"All IMA [Investment Manager Association] disclosure tables received by trustees of Harrow Council

- from all investment managers appointed by Harrow Council
- for all available periods."

He further clarified the information he wished to receive, by adding:

"I attach a pro forma table, taken from Appendix 3 of the IMA's Pension Fund Disclosure Code (Second Edition, March 2005), in case there is any ambiguity about my request."

The complainant also requested a list of investment managers appointed by the Council.

The Council states that it received the request on 25 July 2006.

4. The Council wrote to the complainant on 14 August 2006 and refused to provide the information requested on the grounds that the information was provided to the Council in confidence and was of a commercially sensitive nature. It did, however, provide the complainant with a list of its investment managers.

5. The complainant contacted the Council on 18 August 2006 and requested an internal review of the decision to withhold the IMA disclosure tables.

6. On 8 September 2006 the Council confirmed its decision to withhold the information on the grounds that the information was exempt under sections 41 and 43 of the Act.

The Investigation

Scope of the case

7. On 23 March 2007 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 Council's refusal to supply the IMA disclosure tables.

Chronology

8. The Commissioner wrote to the Council on 29 March 2007 and advised that he had received a complaint about its handling of this request. No further correspondence has been entered into with this authority, as the Commissioner has based his decision in this case upon the decision taken in the lead case.

Analysis

9. The Commissioner's analysis of the section 41 and 43(2) exemptions, the balance of the public interest and his concluding view in this matter, are identical with those in the lead decision.

The Decision

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

    The council was able to apply the exemptions under section 43 and section 41 of the Act to withhold the names of the brokers and to any market areas named in the tables.

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

    The council was not able to apply the exemptions under sections 43 and 41 of the Act to the remaining information in the tables and it should therefore have disclosed these sections of the tables to the complainant in response to his request.

Steps Required

11. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose all of the information from the disclosure tables other than the names of the brokers concerned and any market areas named in each table where applicable.

12. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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13. 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

14. 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@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 served.

Dated the 13th day of February 2008

Signed ……

Richard Thomas
Information Commissioner

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

Appendix 1: Commissioner's Decision in case FS50155391

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 4th February 2008

Public Authority: Tameside Metropolitan Borough Council
Address: Council Offices
Wellington Road
Ashton-under-Lyne
Tameside
OL6 6DL

Summary

The complainant requested information on the commission payments made by investment managers on behalf of the council. The council claimed that the information was exempt on the basis that the exemptions in section 43(2) (commercial interests) and section 41 (information held in confidence) applied. The Commissioner's decision is that the exemption in section 43 was engaged by the information however the public interest in disclosing the majority of the information overrides the public interest in maintaining the exemption. He also decided that the exemption in section 41 was partially applicable. However the public interest defence inherent in the common law of confidence also meant that a disclosure of the majority of the information would not be actionable in law. The exemption was not therefore engaged by this information. The Commissioner's decision is that the information should be disclosed with minor redactions.

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 19 July 2006 the complainant requested from the council

> "all IMA (Investment Management Association) disclosure tables received by trustees of the Greater Manchester Pension Fund (the GMPF) from all investment managers appointed by the GMPF for all available periods".

He further clarified exactly what he wished by adding:

> "I attach a pro forma table, taken from Appendix 3 of the IMA Pension Fund Disclosure Code (Second Edition, March 2005), in case there is any ambiguity about my request."

The complainant also requested a list of investment managers appointed by the GMPF.

3. The council responded on 25 August 2006. In that letter, it provided a list of the investment managers it had appointed. However, it refused the request for copies of all disclosure tables it held because the exemptions under section 41 (confidentiality) and 43 (commercial interests) of the Act applied.

4. The complainant wrote to the council again on 19 September 2006 requesting that it reviewed its decision not to disclose the information to him. The council responded on 23 October 2006 upholding its decision for the same reasons.

The Investigation

Scope of the case

5. On 23 March 2007, the complainant contacted the Commissioner to complain about the way his request for information had been dealt with. The complainant specifically asked the Commissioner to consider whether the information he had requested should have been disclosed to him.

6. The complainant has also made the same request to a large number of other authorities. Some provided the information to the complainant however others did not, or they provided redacted versions of the information. The complainant has made complaints to the Commissioner about these, and there are therefore are a number of other cases linked to this Decision Notice.

Chronology

7. The Commissioner wrote to the council on 16 May 2007 highlighting that the complainant had requested a decision from the Commissioner and that the council's response to his request was to be investigated. He asked the council if it wished to make any further arguments in support of its application of the exemptions. He also asked for an example of the disclosure tables in order to understand the nature of the information in question. The Commissioner specifically asked the council to address why it believed this information should be exempt when other authorities had provided it to the complainant.

8. In response to this request, on 31 May 2007 the council wrote to the Commissioner requesting a list of the other authorities that had supplied the information to the complainant. After checking with the complainant that he could disclose this list to the council, the Commissioner provided it to the authority on 13 June 2007.

9. The council responded on the 29 June 2007 providing an analysis of the disclosures in response to the other requests to the other authorities, an explanation of its own reason for applying the exemptions, and a copy of a letter from one of the fund managers it employed explaining why it believed the information should be exempt. It also provided example of disclosure tables, although in some cases small amounts of information were redacted as it was commercially sensitive and the investment manager did not consider it necessary for the Commissioner to see this in order to make his decision.

10. However, the council also stated that when it had contacted another of the fund managers concerned. The manager had reviewed his position and was happy for older disclosure tables to be provided to the complainant. Accordingly, copies of disclosure tables from the periods July 2005 to June 2006 were disclosed to the complainant from this manager.

11. The Commissioner wrote back to the council on 14 August 2007 asking further questions why the council believed a disclosure of the information would prejudice any party's commercial interests. The council responded on 29 August including a further response from one of its investment managers. In that response the investment manager proposed that redacted versions of the tables could be disclosed to the complainant. The Commissioner did not however follow this suggestion further given that the complainant had made similar complaints about other authorities that had in fact disclosed more information than was suggested in this case.

12 On 28 November 2007, the Commissioner wrote to the council again asking it to provide clarification on some of the arguments put forward by one of the investment managers, and of some of the figures provided in the tables. The council telephoned the Commissioner stating that it would respond as soon as it was able to.

13 The council responded on 17 December 2007 providing a response to the questions asked.

Findings of fact

14. The Commissioner has established that although the Greater Manchester Pension Fund is not directly caught within the scope of the Act, Tameside Metropolitan Borough Council is a public authority, is responsible for administering the fund, and holds all of the requested information in its own right under the Local Government Reorganisation (Pensions etc) (Greater Manchester and Merseyside) Order 1987. S.I. 1987/1579. It was therefore under a duty to respond to the request.

Analysis

Relevant background - What are IMA disclosure tables?

15. In 2001, Paul Myners was commissioned by the Treasury to produce a report on institutional investment in the United Kingdom. The resultant report highlighted potential conflicts of interest in the chain of investment between pension funds, investment managers, and brokers. Brokers charged investment managers a commission as a cost of investing with them. This commission was deducted directly from the pension fund. However, the payment was in part returned to the investment managers by the brokers by way of "soft commission" or "bundled brokerage"; essentially beneficial goods or services provided to the investment manager in return for using their expertise. These goods or services benefit the investment managers but may only benefit the pension fund indirectly, if at all.

16. The benefits provided to the investment manager in this way are generally in direct proportion to the value of investments made by him with the broker concerned. This value may include other investments made by the investment manager on behalf of other pension funds or private investors.

17. The fact that investment managers may receive more benefits by investing larger sums with a particular broker was considered by Paul Myners to be problematic. His report highlighted that a conflict of interest may arise as investment managers had an incentive to invest more with some brokers than may actually be warranted by the best interests of the pension funds themselves. It further suggested that "overtrading" may be a result of these practices.

18. In April 2003, the Oxford Economic Research Associates (OXERA) published a report on the assessment of soft commission arrangements and bundled brokerage services in the UK. OXERA reported that commission costs depend on the commission rates negotiated by the investment manager with its brokers and are often linked to the volume of trades undertaken on behalf of the pension fund. These 2 factors are not under the control of the council but instead are left to the discretion of the investment manager.

19. However, it also found that commission rates are in general not considered an important factor when pension funds are choosing an investment manager. The major reason for choosing a particular manager tends to be one of fund performance and the returns a particular manager is likely to, or has historically been able to generate. Management fees are also considered a more important factor.

20. The OXERA report also highlighted that commission rates are not likely to be an area where particular pressure is brought to bear by a potential investor. At p.57, para 191 it states that:

"It is unlikely that this would result in the same pressure as that on management fees in the negotiation between the pension fund and fund manager. Commission

costs can only be monitored retrospectively and their order of magnitude is relatively small (compared with fund value and performance). An increase in commission costs is likely to be too small to make pension funds switch fund manager."

21. OXERA identified that whilst management fees are paid upfront and do not therefore affect the funds performance, commission fees are paid directly out of the fund when incurred, and therefore affect the overall performance of the fund. OXERA reports that there is generally an agreement between a pension fund and the investment manager allowing it a form of 'carte blanche' to deduct commission fees as needed. Investment managers are often able to deduct as much money as is required from the 'pot' to meet the best execution needs of the pension fund. The central limitation preventing investment managers abusing this is that funds deducted in this way affect the overall performance of the investments and therefore the apparent effectiveness of the manager in investing successfully. An abuse of trust in this system may also lead to a pension fund refusing to use that particular manager again.

22. After the publication of the reports the Financial Services Authority (the 'FSA') introduced guidelines in Policy Statement 05/09 that required investment managers to disclose to pension funds what arrangements they have made if they have entered into an arrangement for the receipt of goods or services with brokers when making a trade on behalf of the fund. It also limited the types of benefits investment managers may receive from brokers to payments made for the execution of trades or for research, and only in situations where the investment manager has reasonable grounds to believe that their receipt is of benefit to the clients they are acting on behalf of.

23. The guidelines, which had to be implemented by 1 July 2006 state that in deciding whether an investment manager has complied with prior and periodic disclosure guidelines it introduced as part of the monitoring system, the FSA can have regard to whether the investment manager has disclosed the disclosure tables that are the subject of this request to its client. The guidelines formed part of the FSA's Conduct of Business Sourcebook (COBS), and have been retained in the newest versions of this, 'NEWCOBS', which came into force in November 2007.

24. Hector Sants, Chief Executive of the FSA, stated in a speech dated 25 January 2005 that there were two central aims to the introduction of new disclosure requirements on commission payments:

- That fund managers have stronger incentives to make efficient decisions about trade execution and the purchase of ancillary services such as investment research; and
- that fund managers should be fully accountable to their clients for those decisions, and the consequent expenditure of their clients' funds…

25. The IMA disclosure tables themselves were drawn up by the IMA as a way of providing greater transparency on an investment manager's dealings on behalf of a client. They provide a list of how the commission has been spent by an

investment manager, as well as comparative information on other investments made by the investment manager. Pension fund trustees can then compare the commission levels paid on its own investments with those of the investment manager's commission payments overall. Thus, the disclosure tables provide amalgamated information on investments made on behalf of private third parties by the investment manager. The use of the disclosure tables is voluntary, however both COBS and NEWCOBS requires prior and periodic disclosure of commission figures by investment managers and it can take into account the submission of IMA disclosure tables as a means of complying with the legal disclosure regime.

26. The implementation of disclosure tables was intended to allow for the introduction of a further level of checks and balances on investment managers' commission payments, and to restrict commission to that which is in the best interests of the investment manager's clients. The tables are intended to allow trustees and pension fund managers to question the investment manager's commission payments, make it easier for them to ascertain whether the arranged commission agreements are appropriate and whether they are approximate to other commission levels agreed by that manager. OXERA pointed out that, traditionally, fund managers may not have been that interested in questioning commission fees, or that they may not have had the necessary expertise in order to identify potential problems by asking the necessary questions of the manager. The introduction of the tables was therefore intended to give trustees the information they need in order to ascertain if the investment manager is acting in the pension funds best interests. This was intended to be bolstered by training to ensure that the trustees of funds are trained to a level where they can fully understand the information they are supplied with and hold investment managers to account for their actions.

27. In 2006 OXERA published a follow-on from its previous report. This post - implementation report looked at the effect the introduction of the FSA's requirements had had by that time. The report highlighted that its post implementation interviews with fund trustees suggested that pension funds had not, in general, started analysing the data in the reports at that time. It also stated that the results of these interviews, together with the low number of completed questionnaires it received from pension funds, suggested that fund manager's use of client's commissions is currently not "high on the agenda of pension fund manager's trustees". It is therefore questionable whether at the time of the report the intentions of the FSA in introducing the requirements had been fully met.

28. It is important to recognise that the FSA's requirements legally require investment managers to act only in their client's best interests. They are only to receive benefits from brokers in return for investing with them which are of direct benefit to their clients. Hence it can be said that, on the face of it, the likelihood of market abuses under the commission system as highlighted in the Myners report has been addressed to some extent, and that the likelihood of a conflict of interest developing should be greatly diminished under the FSA's system.

29. The Commissioner recognises that the IMA disclosure tables are a voluntary method of meeting the prior and periodic disclosure requirements of COBS and

NEWCOBS. They allow pension funds access to information which might highlight any improper dealing which has occurred and allows trustees to compare their commission rates to the investment manager's other clients overall. The Commissioner recognises however that there is a requirement for investment managers to disclose regular information on their commission usage to their customers in any event.

The pension fund

30. The GMPF is the staff pension scheme for the ten local authorities in Greater Manchester and a host of other related bodies, such as schools, colleges and charities. It is part of the nationwide pension scheme for local authorities, the Local Government Pension Scheme (LGPS).

31. The LGPS 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 council does not directly affect the pension rights of individuals who are members of the scheme.

32. The stated aims of the GMPF 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.

Exemption

Section 43

33. The council, in its role as the administrative body in charge of the GMPF claims that the information is exempt from disclosure under section 43 of the Act as its disclosure would prejudice its commercial interests, those of the investment managers, and also the brokers associated with the investment managers. The wording of section 43 is provided in full in the legal annex to this Decision Notice.

34. One of the investment managers associated with the authority also provided arguments in support of the view that disclosure would be prejudicial to the commercial interests of the parties concerned. These arguments are also considered below. The other investment manager agreed to voluntarily disclose the information as outlined in paragraph 10 above. The Commissioner has therefore considered the prejudice that is suggested is likely for each of the parties involved.

Prejudice to the commercial interests of the council

35. The council argues that commission rate levels may increase as a result of the disclosure of the tables, and therefore that its commercial interests will be prejudiced. It further states that disclosure may affect its relationships with its investment managers, and also the investment managers with their brokers. As a result, the council may not be able to obtain the best terms with investment managers, and investment managers may not be able to obtain the best terms with their brokers. Overall the levels of commission may therefore rise, thereby reducing the money the pension fund has available to invest.

36. The council also argues that it is being asked to disagree with an investment manager's view that disclosure would be prejudicial to it and to the council. It states that the fund managers have the necessary experience to judge the likelihood of disclosure being prejudicial rather than the council, and to disclose it against the investment manager's wishes would damage its business relationship with that investment manager.

37. The Commissioner considers that this argument holds little weight. It is likely that in many cases a contractor will have a greater knowledge of the business it is running than the authority. If this argument were to be upheld, in every case where a contractor provides an argument that the information should not be disclosed the authority would need to claim that the information is exempt from disclosure without considering its actual nature itself.

38. The Commissioner does not therefore accept the argument that the council being asked to disagree with the views of its investment managers is a reason in itself for withholding the information. The onus is on the council to consider the nature of the information and make a judgement of its sensitivity bearing in mind the arguments put forward by the investment managers. If it disagrees with those arguments and does not consider that an exemption actually applies then it should disclose the information.

39. Beyond these relationship arguments, the central concerns of the pension fund surround the view that disclosure would adversely affect its investments. The main way this could occur is through an adverse effect occurring to the abilities of its investment managers to negotiate the best terms for the interests of its customers. This is considered further below.

Prejudice to the commercial interests of investment managers

40. The contractor argues that the commission levels the investment manager agrees with its brokers would be divulged, and other brokers may use or compare these levels when negotiating with it and use the figures as leverage to obtain better rates themselves. This would be detrimental to both its, and the council's commercial interests as commission rates would therefore rise.

41. Disclosure may also provide a degree of information on the strategies used by the investment manager to agree commission rates with particular brokers. It could for instance provide an indication of an investment manager's baseline

negotiating figures and any strategy it might use for setting that baseline. The council argues that because of this, disclosure could jeopardise the business relationships between the council and the investment manager as sensitive information demonstrating the investment manager's strategies, (including the investment manager's private investments) could be disclosed. This could affect its competitiveness compared to its competitors, as well as its position in the market.

42. The investment manager also put forward an argument that disclosing this information may damage the relationships between it and its brokers if they find that other competitors are either used more often or that better rates have been agreed with the other brokers than are offered to them.

43. The Commissioner accepts that the information in question could in some cases provide an indication of a baseline figure (or figures) used as a starting point in negotiations by an investment manager. Knowledge of this may be used by other investment managers when seeking to obtain new investment in competition with the investment manager. The Commissioner does not however accept that specific information will be discernable from the information as the baseline figure may be amended by many other factors during a negotiation.

44. The Commissioner also accepts that a degree of prejudice may occur to an investment manager if rates it has agreed with particular brokers are divulged in the tables. Other brokers may use the figures in their negotiations with the investment manager in order to better their own positions in any agreement. They may seek to obtain similar rates to other brokers whose figures are provided in the tables. This has the potential to increase commission rates payable by the investment manager, and thereby lessen the pension fund's overall "pot" for investment.

45. The Commissioner notes that this would not, in itself, be directly detrimental to the investment manager however, as commission payments are taken from client's funds rather than paid by the investment manager. It would not therefore impact directly upon the investment manager's costs. The Commissioner does accept however that were this to occur, prejudice would occur to the commercial interests of the pension fund. The potential for rates to rise because of disclosure is considered further in paragraphs 53 to 65 below.

46. The Commissioner does not accept the argument that the business relationship between the council and fund managers in general would be damaged. The investment manager would realise that, as a public authority, the council would be likely to be open to greater levels of scrutiny than private investors. The Commissioner also expects the council to make clear to investment managers that it is subject to the Act and that it is possible that such information could be requested and may need to be disclosed. Guidance issued by the Commissioner and by the Ministry of Justice has previously highlighted that authorities should seek to amend contracts to reflect this situation. He also notes OXERA's findings (noted in paragraph 19 above), that commission rates are not particularly important when an investor is choosing an investment manager.

47. The Commissioner has however considered the situation in this case further. One of the investment managers has provided evidence that it discloses more detailed information to the council than is required under the IMA disclosure code and hence greater levels of information would be disclosed than would otherwise occur with a disclosure of these tables. He has considered this further in paragraph 70 to 75 below.

Prejudice to the commercial interest of brokers

48. The investment manager also argues that disclosing information that specifically associates particular rates with particular brokers may be prejudicial to the brokers concerned. The commission levels disclosed could affect broker's negotiations with other investment managers as they could be used by these managers as leverage to obtain more favourable rates in negotiations.

49. Because of this, brokers may become less willing to provide preferential or better rates of commission to investment managers in case other potential clients seek to negotiate the same preferential deals from them. The Commissioner has considered this argument further below.

50. The Commissioner has therefore considered the potential for relationships between brokers and investment managers to be damaged in this way. He accepts that there may be a problem if a contract agreed with the investment manager results in a detrimental effect on a broker's other business dealings.

51. However the Commissioner considers that brokers are likely to have a spread of favoured investments and have many different types of investment strategies. The investments they choose to make are also likely to be entirely dependent upon market conditions at any particular time, and the levels of investment to be made.

52. The Commissioner therefore considers that brokers would be able to refute some arguments on the basis that the conditions are different for each case. The Commissioner does however accept that in some negotiations, a specific disclosure of commission rates which have previously been agreed by the broker may cause the broker difficulties, and that a degree of prejudice to the commercial interests of the brokers could therefore occur. He notes however that if the application of such pressure did in fact force overall commission rates down, this may be of benefit to the investment manager's clients.

Open to closed system of negotiations

53. The Commissioner is also aware that if these tables are disclosed, the way commission rates are negotiated would change from a closed system, where each broker negotiates their rates without knowledge of their competitors, to one where competition is open and brokers compete against each other with knowledge of their competitors previous rates. The argument put forward by some managers is that this could result in higher rates being paid overall compared to the current system because a "levelling" effect may occur. This is dealt with further in paragraph 127 to 131 below.

54. It is argued that levelling would occur because firms would have less incentive to provide commission rates significantly lower than the average level which they could ascertain from the tables. Firms who are named as one of the top 10 brokers used by an investment manager would also have less incentive to provide more competitive rates, as their standing with the manager would not require them to do so. As it currently stands, they do not know their position with the investment manager and will therefore continually seek to offer rates which they believe are more competitive than their rivals. The argument is therefore that disclosure would be prejudicial to the commercial interests of the council as overall the commission levels would rise because of this.

55. Further to this, brokers who have access to figures showing rates from an investment manager's other deals may seek to use these figures to better their own terms when negotiating with the investment manager. This might lead to an increase in the commission rates being paid.

56. On the counter side, the argument put forward by the complainant is that a disclosure of the tables would in fact lead to greater competition between parties, thereby creating stronger market forces which will in turn reduce the overall commission levels being paid from the fund.

57. The Commissioner is being asked to make a judgement between two very different systems of competition in making this decision, namely

> 1) The current position, where each deal is carried out in secrecy and brokers try to consistently outguess their competitors in order to provide better dealing terms,
>
> 2) The more open view where each broker can obtain details of its competitors previous commission rates and can react accordingly in order to secure a more advantageous deal with the investment manager.

58. The Commissioner is essentially being asked to consider that if the system in point 2 is implemented a levelling effect will occur. He is also being asked to accept that this will be detrimental to the investment manager's chances of achieving best value on behalf of the fund because overall commission rates will invariably rise. However, the complainant states that the opposite effect is likely to occur; that open competition between brokers would lead to an overall reduction in commission values as each broker seeks to undercut the other to obtain a contract. There is also the possibility that other brokers would see that they can offer more competitive commission rates and may therefore seek to negotiate their own terms with the investment manager. It is therefore possible that the rates would in fact be lower under this system.

59. Although he is aware that greater transparency generally improves competitive processes, the Commissioner does not have the specialist expertise to judge what the result of changing the system in this way would be. His view must therefore be that a degree of prejudice to the party's commercial interests "might"

occur. However the Commissioner must consider whether prejudice would or "would be likely" for the purposes of section 43.

60. In the case of *John Connor Press Associates Limited v The Information Commissioner* the Information Tribunal addressed the test for "would be likely" and confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.".

61. This interpretation follows the judgement of Mr Justice Munby in R (on the application of Alan Lord) v Secretary of State for the Home Office [2003]. In that case, the view was expressed that, "Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."

62. In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.

63. The Commissioner has considered this guidance. He notes that of the many authorities who received this request from the complainant only very few have raised a levelling effect as an issue in support of their position. He also notes that no evidence has been provided to the Commissioner in support of the argument that rates would rise under a more open system. This is therefore a hypothetical assertion albeit one based upon a summary of the information which is available. However the complainant has put forward an equally hypothetical argument that market forces would in fact lower the rates being offered.

64. It is questionable whether levelling out would in fact raise the overall levels of commission being paid. It is equally possible that even if levelling out occurred rates would in fact level at a rate which would, overall, reduce the commission payments the council pays for its investments.

65. There are therefore many variables to the above scenario, and no clear evidence which effect would be more likely to occur. However the Commissioner considers that other factors may provide an indication of the possible outcome that a disclosure may have.

Disclosure of this sort of information by other public authorities

66. The Commissioner has considered the above arguments in the light of the fact that other councils and investment managers have provided the information in response to the request. The Commissioner asked the council to provide reasons why it felt it could not disclose the information whilst other authorities were able to do so. In response, the council contacted a number of the authorities and asked each why they felt able to disclose the information. Although some authorities did not reply to the request, others did, providing reasons and other information in reply to the council's request.

67. The council concluded that nothing clear can be deduced about the information released by the other authorities or the reasons behind such disclosures.

Although it was clear that some disclosures were made through error and that other authorities disclosed the information without consulting their fund managers, other fund managers did not appear concerned by the disclosure of the information.

68. The Commissioner has considered this position. If other authorities have disclosed this sort of information, and other investment managers are happy for this information to be disclosed then this is strong circumstantial evidence that disclosure would not be particularly prejudicial in this case. The Commissioner considers that this undermines the arguments put forward by the council and the investment managers to a certain extent.

69. However one of the investment managers involved with this council states that an agreement to allow disclosure by other investment managers is irrelevant as far as its own position is concerned. It argues that there may be important differences between its information and that disclosed by others, and that the circumstances of the investment managers concerned may also be different. It suggests as an example that the level of detail included in the disclosure tables for these companies may be much lower and therefore the information far less commercially sensitive.

70. It has also provided an argument that the level of detail it provides to the council in its tables goes further than is required by the IMA disclosure code, and that as a result of this, disclosure could be particularly prejudicial to its commercial dealings. It has also suggested that these tables would provide details on its approach to its relationships with its brokers and clients if disclosed, and that these relationships could therefore be affected through disclosure.

71. The Commissioner considers that this argument holds some weight. He accepts that the disclosure tables provided to the council by this investment manager are more detailed than that of the other investment manager used by the council. Whilst both contain detailed tables, the tables from this manager contain information broken down by country or geographical area of investment and the top 10 brokers for each area are included. The other investment manager has provided information on its top 10 brokers globally as is normal under the code.

72. The Commissioner therefore accepts that the information is more detailed and that it may be more detrimental to the investment manager's competitive position compared to that of other managers. More transaction details will be disclosed allowing greater scrutiny of the investment manager's dealings than others.

73. A result of the Commissioner ordering disclosure in this case could be that investment managers who provide more information than is actually required under the disclosure code could decide to provide less information to councils, and only supply the minimum required by the code.

74. The public interest effects of this are considered further in paragraph 87 – 89 below. The Commissioner however considers that it is unlikely that the provision of less information to the council would be particularly detrimental to its commercial interests, as information on the council's investments would still need

to be disclosed under the FSA's guidelines. Compliance with the IMA disclosure code does not necessarily meet the requirements of the FSA guidelines, which require that in all trades where beneficial commission returns are agreed, information should be disclosed to the client about that agreement. The Commissioner is therefore satisfied that the redaction of information from the IMA disclosure tables would not of itself be detrimental to the council. Investment managers, as regulated bodies under the Financial Services and Markets Act, would be under a duty to provide this sort of information to their clients under the FSA requirements set out in COBS and NEWCOB, in any event.

75. The Commissioner also considers that the commercial damage that could occur could be lessened if the council were to redact the names of the geographical areas which are reported upon in the tables. This may prevent brokers identifying their position with the manager to some extent, and may also prevent a deeper degree of strategy analysis being carried out by competitors of the manager. The Commissioner also considers that a redaction of the areas concerned would not be detrimental to the overall purpose of making the council more transparent in its dealings with its brokers.

76. The Commissioner considers that the findings of the initial OXERA review seems to negate the suggestion that disclosure would automatically cause prejudice to the investment managers in their negotiation with local authority pension funds. If commission rates are not a high priority when choosing an investment manager, it is unlikely that a disclosure of this information would ultimately result in commercial prejudice where this side of the relationship is concerned. These arguments may help to explain why some investment managers are less concerned about a disclosure of the information to the complainant.

77. The Commissioner notes, however, that as a result of disclosing these tables councils may consider commission rates more closely when choosing an investment manager. The Commissioner also recognises that investment managers' negotiations with individual brokers could be affected by a disclosure of the information in spite of the fact that pension funds do not appear to place a great weight on commission rates at this time. A question therefore springs from this as to how much influence commission negotiations play on the relationship between the investment manager and the brokers. The levels of commission are relatively small compared to the overall value of the fund but often amount to many hundreds of thousands of pounds in actuality. Commission payments do not directly affect the fees paid to the investment manager but are directly deducted from the fund pot. Therefore, larger commission payments are not a direct "cost" to the investment manager but to the pension fund. If an agreement by the manager to pay larger sums as commission will not be overly scrutinised by public authorities, and some benefit will be derived by the investment manager in return for that commission payment, there is clearly the potential for a conflict of interest. Both the broker and the investment manager could benefit from larger commission agreements however the fund itself could lose out other than in an indirect fashion. If however these figures are disclosed and become open to general scrutiny then this may be an additional limiting factor on such agreements on top of the requirements in NEWCOBS. There is therefore clearly concern by these parties that opening the figures to greater public scrutiny may in fact result

in commercial detriment to the brokers concerned, but also, to an extent to the investment managers who may have their agreements scrutinised more closely in the future.

78. The exemption in section 43 requires that the disclosure would cause, or would be likely to cause prejudice to any party's commercial interests. In accepting an argument that investment managers' and brokers' commission negotiations may be affected by a disclosure of this information the Commissioner's conclusion is that the exemption is engaged.

79. As section 43 is a qualified exemption the Commissioner has gone on to consider the public interest in the disclosure of this information.

Public interest

Public interest in disclosing the information

80. The arguments in favour of disclosing the information can be summarised as follows:

1. the public interest in highlighting whether the council is properly analysing the disclosure tables and avoiding potential conflicts of interest having an effect on the overall returns,

2. the public interest in shedding further light on whether the code has in fact had the effect it was meant to have had,

3. the public interest in providing information which will add to any debate as to whether the agreements made by the investment manager are in the pension funds' best interests and amount to best execution,

4. the public interest in creating transparency and in informing the public about the use of public funds.

81. The central argument for the public interest in disclosing the information in this case surrounds the creation of transparency and accountability of public bodies in their decisions and actions in investing public money. Money that 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 amount required 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. This could take funding away from the other functions and services of an authority, to the detriment of the local community, and require an increase in taxation. There is therefore a strong public interest in the disclosure of the information.

82. Commission deductions directly affect the level of returns on the investment, albeit to a limited degree. The Commissioner is however aware that the overall affect on the success or failure of particular investments is not likely to be great given the magnitude of the deductions compared to the level of the investment.

This weakens any argument in favour of disclosure that is based on the success or failure of the fund as a whole as commission deductions are unlikely to have a marked effect on their own.

83. There is however still a clear public interest in the public being able to scrutinise the council's commission payments. The council can then be held accountable for the decisions it takes with public funds, and any issues about the levels it pays in commission can be scrutinised and questioned further. Where investment management is shown to be good, the disclosure of this information will provide public confidence in the council's decision-making and in its financial management of the fund. Where levels appear inappropriate further questions can be asked about the council's monitoring of the deductions.

84. The requirement for disclosure tables was brought in by the FSA in order to make a pension fund's dealings with investment managers more transparent given the potential conflicts of interest identified by the Myners Report. Measures were therefore brought in to provide transparency in the agreements between investment managers and brokers as a method of policing the new limitations on those agreements. However, in order for the system to be successful it requires the investment manager to provide accurate and specific information in the tables, and pensions funds to actively scrutinise the commission payments that are made and question any rates which appear incongruous. As OXERA suggests that this latter requirement may not be occurring to any great degree, there is a strong public interest in this information being disclosed if it aids the public in ascertaining whether this system of policing is in fact effective.

85. The Commissioner does not know or suggest that the levels of scrutiny employed by the council in this case are lacking. However, as highlighted above, OXERA found that questioning commission payments was not high on the agenda of most pension funds at the time of the review. The council also stated that it prioritised and managed the fund appropriately, "taking account of the relative importance of each issue". It also stated that although the direct costs of trading were not insignificant […they] are very small in the context of the other costs of investment activity and indeed the returns generated. The Commissioner therefore recognises that the GMPF does not consider this one of its highest priorities given that it is the overall success or failure of the fund which is of highest importance to its members.

86. As a result of the above the Commissioner therefore considers that there is a very strong public interest argument that this information should be disclosed in order that interested parties can question the council to ascertain if its level of scrutiny on such payments is appropriate.

87. However, the Commissioner has also considered the situation as highlighted in paragraphs 70 - 74 above; one of the investment managers provides more information than is required under the IMA Disclosure Code in that it separates its returns by geographical area and provides its top 10 figures for each of the areas. The Commissioner has considered whether the provision of this "extra" information to the council aids the pension trustees in their scrutiny of the actions of the investment manager. He has further considered whether disclosure could

lead to less "additional" information being provided; i.e. whether investment managers might in response limit the information they provide to the minimum stipulated in the IMA code. Clearly such a reduction could be damaging to the pension fund, and against the public interest as a whole.

88. However based on OXERA's findings it appears in any event that this information is not greatly scrutinised by many councils currently, and so the provision of "additional" information by an investment manager may not actually be used to great effect at the moment. The Commissioner is also satisfied that the requirements of the FSA's Conduct of Business Code will lessen the likelihood that less information would be provided as investments where benefits are received in return would still need to be disclosed.

89. There is therefore a balance to be drawn between the possibility that less comparative information would be provided to councils in the future balanced against the possibility that disclosure would provide an incentive for greater levels of scrutiny by councils in general. The Commissioner considers that one way of reducing the concerns of the investment manager would be to allow the redaction of the names of the areas concerned. This may lessen the commercial prejudice parties may incur. The Commissioner also considers that it would not hinder the ability of the public to scrutinise the commission deductions. Accordingly, his decision is that information relating to the location of the markets can be redacted from the tables.

Public interest in withholding the information

90. On the counter side are the arguments in favour of withholding the information concerned. The strong public interest in disclosure must be weighed against the risk that disclosure would create a greater burden on taxpayers by being detrimental to the Council's ability to maximise the fund through its investment management. The Commissioner also has to consider whether the disclosure of this information on a wider scale by authorities could destabilise the market as whole.

91. Essentially the arguments in favour of withholding the information can be summarised as follows:

a) Disclosure could in itself damage the council's ability to maximise the fund and further taxpayers' money could be required to pay the fund's liabilities. This follows the arguments put forward above that disclosure would affect the negotiations between parties and thereby cause commission rates to rise.

b) That a further level of disclosure is not merited as the fund is already subject to audits and checks and is accountable through those checks.

c) That the fund has no need to be further accountable in any event as it has a long running record of successful investment and is one the top public authority investment funds.

d) That the information would not make the council more accountable as the public are unlikely to be able to tell whether commission deductions are appropriate without further information being made available.

e) That disclosure could destabilise the market by undermining the level playing field or by changing the way that the investment process currently works. It would cause a levelling out of commission rates to the detriment of councils and investment managers.

f) The Commissioner has also considered whether disclosure could put UK based investment managers at a disadvantage, as it is only UK based managers that would have this sort of information disclosed.

g) Further to this there is an issue regarding brokers based abroad. There is a possibility that rather than having their commission agreements disclosed they would turn down work from UK based investment managers who invest on behalf of UK public authorities. This could destabilise UK investments compared to that of other countries.

92. The Commissioner had already accepted that negotiations carried out by the investment managers could be affected by disclosure. There is a possibility that this would raise the levels of commission payable and affect the overall investment returns managers are able to generate. He has also considered an argument that a disclosure could result in a levelling effect on the commission levels being paid. The council argues that the disclosure of the information would potentially cause detriment to its investment returns by raising the overall commission payments it has to pay. Ultimately, the effect of losses or underperformance could be that further public funding would be needed to bolster the pension fund to levels where it can meet its financial obligations to its members. The Commissioner notes however that this is unlikely given the fact that commission levels are dwarfed by the general levels of investments and returns carried out. Nevertheless, if commission levels did rise as a result of disclosure this would still take funds away from the pot of investment money and would not be in the public interest. The Commissioner has therefore considered whether specific redactions to the documents may reduce the likely harm foreseen by the council without reducing the overall accountability of the council. These redactions are considered further from paragraph 106 onwards below.

93. The council further argues that as one of the most successful pension fund investors there is less of a requirement for it to be accountable to the public as it has a clear record of success over a long period of time. It argues that this record of success is proof that it adequately manages its investments, and that a further level of scrutiny is not therefore necessary. In addition, it adds that it publishes enough information already to make it accountable to the general public for its actions and decisions. It provides evidence of this by pointing to various documents published on its website such as its annual report and accounts and its statement of investment principles. Additionally it states that it is subject to a series of internal and external statutory audits and checks to ensure that it is performing properly and well.

94. The Commissioner has considered this argument, however he notes that the publication of the above documents do not specifically detail the individual deductions of commission payments from the fund. By not providing this sort of information, the public are not able to analyse whether the deductions are being properly scrutinised by the council or whether they may be damaging to the fund as a whole. The disclosure of this limited information does not sufficiently render transparent the council's investment agreements with individual investment managers.

95. The existence of an auditing function is no guarantee that a particular pension fund is maximising its efficiency and investment potential. For instance, there have recently been some much publicised failures of certain private pension funds. The auditing of these funds was not in itself sufficient to prevent these funds failing. There are obvious concerns that it would not be any more effective in the case of LGPS pension funds. The Commissioner has noted the contents of the Audit Commission's letter to the Secretary of State in its public letter dated 26 July 2006. In that letter Sir Michael Lyons, acting Chairman of the Audit Commission criticised the overall lack of transparency in LGPS pension's management and made suggestions for greater accountability by its members. It also suggested that, at present, current audit requirements do not provide a sufficient level of assurance for taxpayers.

96. The Commissioner notes however that the council in this instance does carry out many of the steps that the Audit Commission suggest are appropriate for LGPS administrators. It produces annual reports and accounts specifically relating to the pension fund, and separate from that of the council itself. It has arranged external auditors to review processes specifically in relation to the pension scheme rather than for the administrating council as a whole. The council also carry out checks on their internal control procedures via FRAG 21 and SAS 70 documents – essentially industry standard checks assessing whether the internal procedures in place are up to appropriate standards.

97. However, the Act is designed to achieve improved access to members of the public to the decision making process of government bodies. It cannot be said that an official audit, which is conducted, in effect, behind closed doors, offers the level of public scrutiny which the Act deems should be available in the absence of an overriding public interest against disclosure.

98. OXERA found that the disclosure regime has not led to an increase in scrutiny of commission deductions by trustees in general. It is questionable whether such factors rate highly in auditors' considerations when compared to the overall management of the fund itself. It is noted however that Sir Michael Lyons' letter does suggest that further levels of checks may be introduced in the near future. In the circumstances, in spite of formal audit requirements and reporting of the fund's position through its annual reports and accounts, etc, there remains a strong public interest in members of the public being able to access information that would enable them to scrutinise and monitor the way in which the council manages the fund to a greater extent.

99. The council has stated that by law it is required to monitor the activities of its investment managers on a quarterly basis. However with OXERA's conclusions the Commissioner considers that there is a great deal of public interest in providing information which would allow the public to question pension fund administrators on the levels of scrutiny they actually apply to their investment managers. This applies equally in this case also.

100. The Commissioner draws the following conclusions from the above. OXERA and the FSA have highlighted the potential for conflicts of interest and have taken steps to reduce the chances of this occurring. This is partially reliant upon the implementation of the disclosure regime and upon a robust questioning of the figures provided through that regime by pension funds. OXERA however established that, in general, the steps that were introduced have not been successful in creating greater levels of scrutiny of commission deductions. In addition, the Audit Commission has highlighted inherent problems in the accounting systems and in the transparency of LGPS pension schemes in general. There is therefore evidence of a lack of adequate scrutiny to police the new regime at present, and councils are generally not transparent enough to raise awareness or concerns in the general public.

101. The Commissioner has further considered the argument put forward by the council that due to its long term success it has less need to be open to scrutiny than other pension funds. He considers however that the overall success or failure of the fund is not the overriding issue when considering whether this information should be disclosed. He accepts that the GMPF's priorities must rest with maximising the value of the fund for the benefit of its members and taxpayers. However, the Commissioner considers that this request actually involves providing public confidence that the council does properly scrutinise its chosen investment managers, and in providing public confidence that it manages its investments in a financially sound and efficient way. It is an area where many thousands of pounds of taxpayers' money are directly deducted from public funds without the public being able to scrutinise and assess a pension funds' management of that activity.

102. An investment manager can be successful in his investment choices with particular brokers whilst still receiving benefits in return from those brokers. If the trustees of the fund do not carefully scrutinise the commission deductions it is quite possible that thousands of pounds of public money is lost to the fund through the commission it pays. The benefits of these deductions may rest with the private investment managers themselves rather than accruing back to the pension fund if inappropriate behaviour is not picked up. A pension fund can, on the face of it be very successful whilst still allowing inappropriate levels of commission to be deducted from the overall value of the fund. On the face of it, its accounts would show perfectly reasonable levels of returns from the investments made.

103. The Commissioner also notes that an additional benefit of allowing the disclosure of this information is that increased public scrutiny of the councils actions would inevitably increase the likelihood that pension funds, (and thereby councils acting as administrators of the fund), would pay greater attention to scrutinising

commission deductions in the future. As a result of such pressure, investment managers may seek to obtain lower commission levels which would lessen the chance of conflicts of interest developing and may ultimately result in greater returns being generated. The aims behind the introduction of the tables may therefore be achieved more quickly. There is therefore a strong public interest in this occurring.

104. The council has also provided an argument that disclosure would not provide enough information to allow the public to decide whether the levels of deduction are appropriate or not. It states that where commission payments have been high in the past these have normally been explained when the investment manager has been approached about them by the council. The Commissioner however considers that the first step in accountability must be for the public to be able to ascertain that high deductions have been taken in the first instance. It is then open to them to question the council further and ask if it has approached the investment manager about the high commission levels. The Commissioner does not therefore accept that this is a strong argument for non-disclosure.

Conclusion

105. Taking into account all the considerations set out above, the Commissioner is therefore satisfied that – in relation to the main body of the information – the public interest in maintaining the exemption does not outweigh the public interest in its disclosure. The main body of the information should therefore be disclosed.

106. However as noted in paragraph 92 above, one of the investment managers has submitted arguments in favour of the redaction of specific sections of the tables in the event that the Commissioner considered that the tables themselves should be disclosed. These sections include the names of the brokers contracted by the investment manager, and information on the way the commission payments have been split between that spent on executing a 'trade' or investment and that spent on researching further investment opportunities. The Commissioner also notes that the above arguments do not specifically address the question as to whether negotiations would rise as a result of disclosing certain sections of this information.

107. The Commissioner has therefore considered whether these sections of the tables should be redacted, and the effect this may have on the outstanding arguments above relating to a levelling of the commission rates and the effect disclosure could have on the negotiations of the parties involved.

Redaction of the names of individual brokers

108. The Commissioner takes into account the fact that brokers are private bodies, acting in a private capacity in a competitive commercial market. They accept and negotiate agreements with investment managers but do not directly negotiate contracts with public authority pension funds themselves. A disclosure of the information in the tables would take into account the private as well as the public agreements made by an investment manager to a very limited degree, and may affect their negotiations as discussed above. The Commissioner has also already

recognised that disclosure may potentially affect brokers' competitiveness in spite of the fact that they may not in reality have considered the impact of agreeing to invest public money on behalf of public authorities or what information may become available as a result of that.

109. In response to this, the Commissioner has considered whether redacting the names of brokers used by a particular investment manager would reduce the likelihood that commercial prejudice would occur to investment managers and brokers without necessarily damaging the ability of the public to scrutinise the commission levels being charged to the council. Without these names, many of the problems foreseen above could be avoided. The Commissioner does recognise however that some problems will remain with the investment managers' commercial interests.

110. If the names of the brokers are redacted then the commission rates paid by the investment manager will still be shown. They would be unlikely however to be attributable to individual brokers. The investment manager has however argued that there would be a possibility that particular brokers could either identify themselves or may be identified through the figures alone. If not, there would be much less likelihood that existing commission rates relating to that broker could be used as leverage against it when it negotiates with other investment managers.

111. Disclosure without the names of the brokers would also not undermine the ability of the public to scrutinise the council's supervision of the investment managers. It would still be apparent for instance that the council was paying much higher rates on deals than investment manager's other clients.

112. However, the levels of commission the investment manager has agreed to with brokers would still be available and the Commissioner recognises that this could therefore be used as leverage by other brokers in their negotiations with the manager. Also, if brokers recognise their own figures and therefore their standing with the investment manager, (i.e. where they fall within the list of the manager's top 10 brokers), this could affect the investment manager's relationship with that broker.

113. This could arguably lead to preferential deals that are currently offered being withdrawn, as brokers may fear that other investment managers may identify these deals and seek similar deals themselves. It would not be in the public interest if the investment manager received less preferential deals as the overall effect would be an increase in the fees payable to the broker directly from the fund.

114. There is also an argument that brokers may provide less beneficial services to the client via the investment manager if the relationship is damaged. The provision of less research information could, in theory affect the investment manager's ability to make the best possible decisions on behalf of his clients, (including the pension fund) and his investment skills may therefore be detrimentally impaired.

115. The Commissioner accepts this point, however he considers that brokers will already have some understanding that their relevance with a manager may vary over time. He therefore considers that their competitiveness may in fact increase if this information is disclosed, and that brokers may in fact be more inclined to provide competitive fees and commission levels to increase their standing in the future. It is generally understood that an open market is generally a more competitive market. The Commissioner does not therefore consider that the investment manager would be likely to lose particular bonuses or favoured treatment from particular brokers. Rather, pressure could be put on others to provide similar deals by the investment manager.

116. The Commissioner has considered these arguments. On one hand, he agrees that it is possible that commercial detriment could occur to brokers in contracts with investment managers managing pension fund investments. On the other, there is recognition that pension funds may not adequately scrutinise the deductions as a result of broker's commission, and that such pressure may actually be in the public interest if, as a result, pension commission rates are reduced.

117. The Commissioner is also aware that the commission deductions themselves often amount to many thousands of pounds, and directly affect the overall returns generated by the investments. They are a hidden management fee that is not on the face of it open to public scrutiny other than in a very general sense. They are also an open-ended resource for the investment manager when negotiating with brokers, albeit tied to the obligation to obtain best execution. The Commissioner must therefore look to achieve a proportionate disclosure that would allow the public adequate access to information to be able to scrutinise the deductions whilst also protecting all commercially sensitive information where there is no pressing reason to disclose it.

118. The degree of damage that is likely to occur is a highly relevant consideration in this balancing exercise given that the Commissioner has already established a pressing public need for making authorities more accountable as regards their commission deductions.

119. On balance, the Commissioner has concluded that a disclosure of broker's names would prove prejudicial for brokers. He further believes that some degree of that commercial prejudice could be alleviated by the redaction of their names from the tables, and that this would not be detrimental to the overall transparency of the investments made on behalf of the council. Accordingly, the Commissioner's decision is that the names of the brokers fall within the scope of the exemption, and that the greater public interest rests in maintaining the exemption in this instance.

Information on the split between execution and research

120. The investment manager makes a particular case that information on the split between execution and research figures should be withheld on the basis that it is extremely commercially sensitive. These figures essentially provide an overview as to how commission payments have been spent between actual costs in 'executing' a trade, and money spent on the research of good investment

prospects. The investment manager states that these figures essentially provide an understanding of the costs associated with using a particular broker, that it has great relevance to the fees the manager has been able to negotiate and that the relationship it has with its brokers would be damaged as a result of disclosing these figures. It believes that the split is an inherent part of the fee rate, and hence disclosure could have the potential to affect relationships with brokers and damage the future negotiation process.

121. The Commissioner has considered these arguments. He has no doubt that brokers understand that the costs they attribute to carrying out particular investments will be different for each broker and may be different for each transaction.

122. The level of the fee is likely to take into account the performance history of the broker, the broker's level of expertise in particular markets, market conditions at the time of the investment or a general desire to use a particular broker for a particular reason at a particular time. Commission rates could be affected by any or all of the above in addition to other factors such as the research information provided in return for a given commission rate.

123. Never the less a disclosure of this information would possibly lead to greater pressure on commission levels being laid against brokers if this was disclosed. The commission being paid is a direct deduction from the fund pot. As such it is a use of public money which is currently hidden on the basis of the potential damage such a disclosure could cause to the brokers concerned. However, the Commissioner considers that a decision that the names of individual brokers may be redacted from the tables substantially weakens the prejudice which is likely. Although investment managers will know commission levels other investment managers have agreed to previously, individual brokers will not be identifiable and no specific pressure would be able to be brought against particular brokers in future negotiations. Pressure would only be able to be brought in a very general way, i.e. by comparing the proposed levels to an average commission rate. Brokers would then be likely to claim the arguments highlighted in paragraph 122 above to seek to justify setting higher rates.

124. The Commissioner also notes that it is only in having access to the information covered in the split that the public can ascertain the differences between the actual costs of the investment, (i.e. the payments made for execution), and the payments made for research. These figures are essential in understanding exactly what has been purchased on behalf of the pension fund. It is therefore essential for accurate figures to be provided showing the actual costs of investment with a particular broker, as compared to the actual cost of the research purchased.

125. The Commissioner has considered the above views and his decision in paragraph 119 above is that the names of the brokers fall within the scope of section 43 and that the public interest in maintaining the exemption by redacting these names outweighs the public interest in disclosing them.

126. In redacting these names, data on the split between execution and research becomes far less sensitive to the parties concerned, but remains essential to

allowing the proper scrutiny of the commission deductions and the uses they have been put too. The Commissioner does note that a disclosure of the information on the split may however give brokers a better chance of identifying themselves amongst the disclosure tables and therefore their standing with the investment manager. The Commissioner's decision is however that greater public interest rests in the disclosure of the information on the split between execution and research.

Disclosure of the information would cause a levelling out of the commission rates

127. The Commissioner has reconsidered this argument further in light of his decision to allow the redaction of brokers' names from the information prior to its disclosure. In the paragraphs above the Commissioner has described a situation wherein pressure may still be put onto brokers via 'average' commission levels; that investment managers may use such information to exert a degree of competitive pressure in their negotiations with brokers in order to lower the commission rates. This could lead to a levelling of commission rates at a level which is lower than that currently paid by the councils overall as investment managers compete to attract public authority contracts.

128. Currently, there is little pressure for investment managers to actively seek reductions in these agreements, particularly as there has been a historic disinterest by councils in this area previously. There may also be some benefits to the investment manager to allow higher commission rates to be charged in order to obtain more or better research material. However, with the introduction of greater levels of public scrutiny on pension fund management it becomes far more likely that they will actively question commission levels with investment managers, thereby increasing the pressure on managers to negotiate lower commission rates with brokers in the future.

129. Disclosure of the information with the names of the brokers redacted would still provide a strong incentive for councils to question investment managers on their commission rates. This would in turn provide investment managers with a stronger reason to try to negotiate lower commission rates. More information would also be available in the form of information on average levels of commission rates which investment managers could use as a tool to facilitate lower commission rates. This would therefore be more likely to reduce the overall level of commission paid by councils.

130. The Commissioner recognises that the above scenario would mean additional pressure on brokers' fees and commission rates that could be detrimental to their commercial interests. However he is satisfied that the objective of making the market more transparent, of creating a means of putting additional pressure on investment managers to negotiate in line with the objectives of pension funds and of creating a more open, but competitive investment system favours the public interest in disclosure rather than maintaining the exemption in this instance. His decision is therefore that a levelling out argument does not provide a strong reason for withholding the information in this instance.

Disclosure could put UK investment managers at a disadvantage as managers in other countries would not have this information divulged

131. Finally the Commissioner has considered whether disclosure could put UK managers at a disadvantage compared to other managers who are not subject to the same disclosure regime. Investment managers operate in a global environment and compete against other investment managers from around the world. There is therefore an argument that the disclosure of this information would destabilise the UK investment market by undermining the position of UK investment managers compared to those based in other countries. A further argument follows that some investment managers currently based in the UK could move their trading desks out of the country in order to avoid the requirement for disclosure.

132. The Commissioner is not convinced by this argument. He notes in particular that investment managers should not in fact enter into agreements which provide inducements or where the return benefits of paying commission rest with the investment manager rather than its client. In addition, agreements to invest are generally initiated by pension funds and it may in fact be the case that greater transparency through this system may lead to further contracts being offered rather than fewer. If investment managers who are based abroad will not supply fund managers with the information they need to assure themselves that deductions are appropriate, the risks associated with this may in fact dissuade UK based authorities from dealing with them at the same levels due to the lack of transparency and the additional risks involved. The converse is also possible – that clients overseas may see the additional information being provided by the UK managers and may seek an agreement with them on a similar basis in order to protect their own interests. The Commissioner does not therefore consider it likely that successful UK based investment managers will be prejudiced by the disclosure as compared to managers based abroad.

133. The Commissioner further notes that it will generally be investment managers who initiate agreements with brokers, and that brokers would be unlikely to fear a disclosure of their own deals if these are anonymised. The Commissioner does not therefore accept that a disclosure of this information would undermine or destabilise UK based investment managers.

Section 41

134. The parties also provided arguments that the information is exempt because its disclosure would be an actionable breach of a duty confidence. The Commissioner has therefore considered this argument.

135. 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 and its disclosure would amount to an actionable breach of that duty. Section 41 is provided in full in the legal annex to this Decision Notice. There are two 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 of the information could take the authority to court for a breach of a duty of confidence.

136. The Commissioner recognises that as confidentiality statements are provided when the tables are provided to the council, information supplied to the council by the investment managers may be exempt from disclosure under section 41 of the Act. He also notes an argument that agreements between investment managers and their brokers may be subject to confidentiality clauses, and that a disclosure of a broker's information outside of agreed terms may amount to an actionable breach of confidence by the council if it was aware that the information was held in confidence by the investment manager.

137. The Commissioner does not accept that a confidentiality clause or an understanding between the parties that the information would be held in confidence will necessarily mean that the information should be, or will be considered confidential. To accept such a view 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 understanding whether the duty of confidence is actually applicable to the information.

Does the information have the necessary quality of confidence?

138. 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:

a) the information must have been imparted in circumstances which create an obligation of confidence,
b) that the information must not be trivial, and
c) that the information must not be readily available by other means.

139. One of the investment managers in this case argues that the information was clearly imparted in circumstances which created an obligation of confidence, that it was always understood by the parties that it would be held in confidence and that it was understood by both parties that it would held in confidence at all times. As evidence of this it points out that the council can only access this information through a password protected area of its website. It also states that its website contains a stipulation of confidentiality in its privacy clause. The Commissioner therefore accepts that there was an understanding between parties that the information was provided with the intention that it would be held in confidence. An obligation of confidence was therefore created when the information was provided to the public authority. The first of the criteria is therefore met.

140. The information is about commission payments on investments made by investment managers on behalf of the council and of the pension scheme members associated to the fund. It includes substantial details on private investment managers' commercial dealings, which could have a direct impact on their working practices, and on the negotiations they enter into. The

Commissioner is therefore satisfied that the information is not trivial or insignificant.

141. As regards the information being available by other means, the Commissioner notes that the complainant has received similar information from other authorities. These disclosures have been considered above. The Commissioner must however consider the specific information requested and it is his understanding that this is not widely known. Hence, although other information of this type has been disclosed by other investment managers in the past, this specific information is not available by other means.

142. The Commissioner's decision is therefore that the information has the quality of confidence necessary for a duty to be owed.

Defences to a disclosure of information held in confidence

143. The Act states that the exemption in section 41 is only applicable if a disclosure is "actionable". 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 that overrides the duty of confidence that is owed.

144. The Commissioner recognises that information on the deals between the investment manager and the broker are disclosed to the council under the remit of the Financial Services and Markets Act, and in particular under requirements in COBS and NEWCOBS. He therefore considers that the investment manager's disclosure to the council cannot amount to a breach of confidence, even if the council subsequently discloses the information more widely in response to a request under the Act. The investment manager therefore has a defence to its disclosure of the information. The Commissioner therefore needs to consider the position and the duties of the council in relation to this information.

145. There are no issues surrounding consent, law, or crime as regards the council in this instance. This leaves a consideration of the public interest. The Commissioner must consider whether the public interest in disclosing the information overrides the duty of confidence that is owed.

The public interest defence to the duty of confidence

146. In the case of Derry City Council v The Information Commissioner (case ES/2006/0014), the Information Tribunal looked at the applicable public interest test to decide whether a breach of confidence was "actionable" for the purposes of section 41. It found that one should start from an assumption that confidentiality should be observed unless this is outweighed by the countervailing public interest factors. The Commissioner considers that the test applicable is therefore a balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence. If the factors balance equally then confidence should be maintained.

147. The Commissioner's decision that a disclosure of the information is likely to prejudice the commercial interests of some of the parties involved adds weight to the public interest arguments that confidentiality should be maintained. However many of the public interest arguments considered above are relevant to the test in this case also. However the Commissioner has to consider the higher threshold associated with maintaining the duty of confidence.

148. The Commissioner notes that the OXERA reports find that the FSA's intended changes have not been fully successful at this time. There was a pressing public interest for pension funds to pay greater attention to the commission payments, and OXERA's findings indicate that this has not yet occurred in general. The Commissioner considers that this is a very strong counter-argument in favour of disclosure.

149. The FSA, in its policy statement 04/13 stated that it accepted the proposal for comparative tables as a solution on a probationary basis only. It further stated that if this did not lead to the changes it wished to see throughout the industry it would reconsider the proposals and potentially move towards a rebate system, which it originally proposed in document CP175, published some years before. OXERA's report suggests the necessary changes have not yet occurred and it is possible therefore that the FSA will begin to look into this proposal again. The requirements of NEWCOBS reiterate the previous disclosure regime from COBS and it seems that the FSA is waiting for the results of the new disclosure regime to become clear once it has had time to properly take effect.

150. The Commissioner has considered the public interest in the disclosure of this information and how this may provide a further incentive for pension fund trustees to achieve the FSA's aims. In requiring that this information is disclosed it is possible that commission payments may be scrutinised to a higher degree by pension funds. Ultimately this will result in greater transparency in investment manager's dealings, create greater pressure to abide by the non inducement clauses of NEWCOBS and may ultimately result in public funds being saved. At the least, the general public will have greater confidence in actions taken by the council if it can ascertain of its own accord that the commission payments made by the council are appropriate and properly scrutinised.

151. The Commissioner has taken into account the commercial sensitivity of the information in question under section 43 and reduced the sensitive information to be disclosed where the public interest favours withholding it. Specifically he has decided that the names of the brokers held in the tables can be redacted in order to reduce the likelihood that they will be affected to any great degree by the disclosure of the information. He also considers that the names of the markets (i.e the locations of specific markets around the world) held in some of the tables can be redacted by the council due to the additional information which is provided above that required under the IMA disclosure table code. For the same reasons, he considers that the public interest test considerations are not strong enough in relation to the names and the areas to provide a defence to an action for breach of confidence.

152. However, he has not been convinced by the argument of the council that it is already as transparent as it ought to be as far as commission deductions are concerned. Nor is he convinced that the current statutory audits provide sufficient checks on the council's actions in this respect to demonstrate to the public that it does properly scrutinise the levels of commission its investment managers pay to brokers. The Commissioner is not satisfied that the public can assure itself that the council properly scrutinises its commission payments from the information which is currently in the public domain, and there is sufficient doubt that the measures introduced by the FSA have been implemented successfully by councils at this time to merit a wider disclosure of the information. The Commissioner has concluded that there is therefore a strong public interest in allowing access to this information in order for interested parties to be able to question the council's actions further on this issue and that this public interest is strong enough to provide a defence to an action for breach of confidence. Additionally he considers that investment managers may obtain some benefits from disclosure in the form of additional information they may be able to use to reduce commission rates, and that this may offset to some degree any prejudice that may occur.

153. As a result of these conclusions, section 41 requires the names of the brokers and the specific areas of business named to be redacted from the tables. The remaining information should however be disclosed.

The Decision

154. 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 council was able to apply the exemptions under section 43 and section 41 of the Act to withhold the names of the brokers and to the market areas named in some of the tables.

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

The council was not able to apply the exemptions under sections 43 and 41 of the Act to the remaining information in the tables and it should therefore have disclosed these sections of the tables to the complainant in response to his request.

Steps Required

156. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose all of the information from the disclosure tables other than the names of the brokers concerned and the market areas named in each table where applicable.

157. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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158. 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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159. 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@tribunals.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 4th day of February 2008

Signed .....

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

Legal Annex

Section 43: Commercial interests.

(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).

Section 41: Information provided in confidence.

(1) 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.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.