

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 March 2010

Public Authority: Leeds City Council
Address: Civic Hall
Calverley Street
Leeds
West Yorkshire
LS1 1UR

Summary

The complainant requested information relating to funding provided by the council and other authorities to a Credit Union. The council confirmed that it held information but withheld it from disclosure on the basis that sections 41 (information held in confidence) and 43 (commercial sensitivity) applied. On review it confirmed that decision.

The Commissioner's decision is that the council was correct to apply the exemptions in section 41 and 43 to the information.

The Commissioner's Role

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

The Request

2. On 24 March 2009 the complainant requested the following information from Leeds City Council (the 'council'):

"I would like the information the council holds on providing a bailout to LCCU, including copies of recorded information/communications."

3. The council responded on 24 April 2009. It refused the request on the grounds that sections 41 (information provided in confidence) and 43 (commercial interests) of the Act applied.
4. The complainant requested that the council review its decision on 24 April 2009.
5. On 22 May 2009 the council responded to the complainant's appeal. It again refused the request for the same reasons.

Background

Findings of fact

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

The Investigation

Scope of the case

12. On 1 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information he requested should have been disclosed to him.

Chronology

13. On 23 September 2009 the Commissioner wrote to the council stating that the case had now been allocated for investigation and asked it for copies of all of the information which had been withheld.
14. On 21 October 2009 the Commissioner again wrote to the council reminding it that he had asked for copies of the relevant information.
15. On 4 November 2009 the council wrote to the Commissioner providing the withheld information together with arguments in support of its position.

Analysis

Exemptions

Section 41: Information provided in confidence

16. The council claim that the information they received from the LCCU was received in confidence, and that it is therefore exempt under section 41. Section 41(1) states:

‘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.’

17. In order for the exemption to be engaged the issues to be determined are therefore whether the information was provided to the authority by another person, and whether disclosure of the information would give rise to an actionable breach of confidence. The test of confidence set out in the judgment of Megarry J in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* requires that:

- the information has the necessary 'quality of confidence' – it need not be highly sensitive, but it must not be trivial;
- the circumstances in which the information was provided gave rise to an obligation of confidence, in that a 'confider' provided information to a 'confidant' in the expectation, whether explicit or implied, that the information would only be disclosed in accordance with the wishes of the confider;
- disclosure of the information was unauthorised and would be to the detriment of the person(s) to whom the duty of confidence is owed, or cause a relevant loss of privacy; the action would not fail on grounds which provide a legal defence to a breach of a duty of confidence, for instance that disclosure would be protected by a public interest defence.

The Commissioner recognises that this is not the only test of confidence; however he considers it an appropriate one to use in this case.

18. The Commissioner does not accept that all information is held in confidence merely because the parties decide together that that will be the case. Allowing this would essentially allow parties to contract their way out of their obligations under the Act. The Commissioner has therefore considered whether the information meets the necessary criteria for a duty of confidence to apply.

Was the information provided to it by another person?

19. Part of the information was provided to the council by the governing body of the LCCU as background to its request for financial aid from the council. The Commissioner is therefore satisfied that this information was provided to the council by another person.
20. However the Commissioner recognises that not all of the information was provided to it by "another person". The council drafted letters and created documents and notes itself relating to its discussions and meetings with the other parties. However many of these documents respond to, and discuss information which was provided to it by the LCCU and/or other persons. Even if an authority drafts documents itself, if the information contained within those documents reiterates or discusses information which was obtained from another person in confidence and its disclosure would reveal that confidential information then section 41 would extend to cover that. It is the information which must be obtained from another person, not specific documents.
21. The Commissioner notes however that there are documents where the council is discussing internal matters where it does not discuss information which has been provided to it by third parties. He is satisfied that this information does not fall within the exception and therefore that the exemption in section 41 does not apply. He has considered this information further under section 43 below.
22. In conclusion, the Commissioner is satisfied that the majority of the withheld information was provided to the council by another person. Although some documents have been drafted by the council rather than by third parties, the information contained within those documents includes information which was

provided to it by the LCCU or other parties, and this criterion is therefore met. A very few documents do not contain information which was provided to it by another party and this information does not therefore fall within the scope of this exemption.

Does the information have the necessary 'quality of confidence'?

23. The Commissioner has considered whether the information has the necessary quality of confidence to be confidential. This takes into account factors such as whether the information is trivial in nature or whether it is already in the public domain.
24. The Commissioner is satisfied that the information is not trivial. It specifically addresses the LCCU's request for funding and the council's discussions with it and other parties relating to this.
25. The Commissioner has also considered whether the information is already in the public domain. A duty of confidence will not be found where the information which is sought to be held in confidence is actually freely or relatively freely available. The Commissioner has borne in mind the fact that the complainant has published a number of stories in the Yorkshire Post which have been reiterated in other newspapers and online news facilities. Where information is published only in part, confidence will still protect the undisclosed parts of the information. In this case, although these stories relate to this situation not all of the information which has been withheld is known more widely, and it retains its significance to the parties involved.

Does the information have the necessary obligation of confidence?

26. The nature of the information which was withheld in this instance together with the manner in which it was provided to the council leads the Commissioner to agree that the information which was provided to the council was intended to be held under a duty of confidence.
27. Whilst recognising this, the Commissioner considers that there must have been some understanding that headline figures and high level facts would need to be disclosed at some point because of the level of public resources which would be provided to the LCCU. However he is satisfied that there would have been no expectation that detailed information on the financial status of the LCCU would be disclosed whilst that information retained its commercial significance.
28. The Commissioner therefore recognises that the council holds the information under an obligation of confidence.

Would disclosure be detrimental to any party?

29. Where commercial information is purported to have been imparted in confidence the Commissioner considers that there would have to be a detrimental impact to the commercial interests of the confider for the exemption to be engaged.

30. The information held by the council includes free and frank discussions on the financial status of the credit union and about the potential actions of the parties which were approached by the LCCU. The LCCU is a not for profit organisation however its activities are carried out in a competitive commercial market. The Commissioner's decision is that as a disclosure of the information would impact upon the LCCU's competitiveness in this instance the information is commercial information.
31. The council argues that disclosure would impact upon consumer confidence in the credit union. Its argument is that disclosure would fuel further media stories, and that this would be commercially damaging to consumer confidence in the LCCU.
32. The Commissioner is satisfied that the arguments above have merit. A disclosure of the information would have increased public concern regarding the situation at the LCCU. Press stories providing and commenting on the situation would have increased any loss of confidence in the LCCU which followed the publication of the previous stories published about the LCCU in the complainant's and other newspapers. The council is unable to take account of the likely or proposed use of the information by the complainant when making its decision however as a disclosure under FOI is considered to be global. Hence the council does not need to take into account the complainant's intention to publish stories about the LCCU when making his request in order to reach this conclusion.
33. The Commissioner considers that a disclosure of the withheld information could prove detrimental to the LCCU in that it would be unable to be as open and frank in its discussions with the council in the future. The LCCU owes a duty to its membership to protect its (and their) interests. If it could not guarantee that the sensitive information it provided to the council could be held in confidence where a disclosure of that information would be damaging to the interests of its members then this would prevent it from being as open and transparent in its discussions with the council and other third parties in the future.
34. Although the LCCU needed the council's funds, the information which it provided to the council in this case would have potentially increased the damage to its commercial interests if it was disclosed more widely. Hence the LCCU would have to reconsider taking an "open book" approach with the council in the future where there was any possibility of its sensitive information being disclosed. However an open book approach would often be the best and potentially the only means of obtaining funding from the council as it, in turn, has a duty to tax payers to ensure that public money is spent wisely.
35. If the LCCU did not feel able to provide as much detail as the council needed to properly consider the full circumstances of the LCCU's approach then it would be unable to provide the funding which the LCCU sought because it could not assure itself of the security and proper use of those funds. If information could not be provided to the council on a full and frank basis the LCCU would also not be able to easily obtain agreement to partnership deals with the council to provide additional services for particular areas of the community. This is an approach which it has been taken on many occasions in the past.

36. The Commissioner is therefore satisfied that a disclosure of the information would cause detriment to the LCCU because it would cause a conflict between its duty to protect its membership and its ability to work with the council to extend its services to reach parts of the community it could not otherwise target. He is therefore satisfied that the information was held under a duty of confidence.

Would a disclosure of the confidential information be actionable?

37. The Act states that the exemption in section 41 is only applicable if a disclosure is “actionable”. As the duty of confidence is not absolute the Commissioner must consider whether there would be a defence in law to a disclosure of the information in breach of confidence. 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.
38. 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.
39. In *Derry v ICO (EA/2006/0014)* the Information Tribunal clarified that the test to be applied in deciding whether the public interest provides a defence to a breach of a duty of confidence is that the duty should be maintained unless the public interest in disclosing the information outweighs the public interest in protecting confidences.

Public interest in maintaining confidence

40. The main public interest in maintaining confidence in this case lies in the ability of organisations such as the LCCU to have free and frank discussions with the council and other public authorities where it is in the interests of their members (and the community) to do so. It is in the public interest of voluntary and not-for-profit organisations to be able to disclose facts and figures about their commercial standing to the council with a view to obtaining aid or assistance without fear that that information might subsequently be disclosed into the public domain. If this occurred at too soon a point in time it could damage the very interests the organisations are seeking to support. The development of a partnership between such organisations and the council in this way benefits the community as the council can work with these organisations to provide benefits and services to parts of the community it would not otherwise be able to access. For instance, the council has previously engaged with the LCCU for many services under its financial inclusion agenda and has aided specific sections of the community by allowing the LCCU to use its properties in the area and by funding individual posts within the LCCU specific to that role.
41. In order to be able to work in this way the council will often need to access full and frank information about an organisation’s financial standing and its

- trading/business portfolio prior to providing it with public funds. It needs to do this to ensure that it exercises diligence when making a decision to spend or provide public money, and to ensure that the most appropriate decisions are taken to aid the public rather than the organisation itself.
42. Given the state of the market at the time when this funding issue occurred, the ultimate risk to the council (and the other authorities involved), was that it provided public funds to the LCCU but that the LCCU subsequently closed in any event. In this scenario the council could lose the chance of recovering the funds it provided, and the negative impact of the loss of the LCCU's services to the community would still occur.
 43. The council would therefore have needed to assure itself that providing the requested funds would have the desired effect; namely retaining the continued existence of legitimate and safe lending facilities for the people of Leeds. It would also need to be aware of, and may wish to assist in drawing up in-depth plans for a way forward which best suits the services which are required by the community.
 44. It is important to emphasis that the council's priorities may not have necessarily involved supporting the LCCU if it identified other, better suited means to achieve its target. The LCCU would therefore have been aware that there was no certainty that the council would agree to fund and support the LCCU. To assure itself that this was the correct course the council would have required a significant and in-depth knowledge of the current situation at the LCCU, which would have required access to sensitive financial and commercial information from it. The LCCU would be in a position where it knew that it had no real alternative but to allow access to this information if it wanted the support which the council could give it.
 45. Information which might have been required might include the cause or the likely cause of the financial situation, information on the current lending strategies and how effective they are, details of the current state of trading at the LCCU and details of forward looking trading estimates and costs.
 46. The Commissioner considers that in reality, the LCCU could not submit such information to the council or the other authorities if there was a likelihood that that information might be disclosed more widely within a relatively short period of time. In reality the LCCU put itself into a potentially disadvantageous position by opening its books to the council, and this may have had detrimental consequences to it if that information was disclosed in response to a request or if the council had not agreed to provide further funds.
 47. Additionally, a disclosure of detailed financial and commercial information would have weakened the LCCU's competitive edge, providing a means for its competitors to seek to undermine it and acquire some of its market share within the city. The Commissioner recognises that the LCCU trades in a market where the majority of its competitors are commercial banks and building societies which seek to make a profit, unlike the LCCU.

48. He also recognises that many of its members may not have been able to obtain credit through these means and in the absence of a credit union may have needed to resort to doorstep lenders to provide services instead. The LCCU is also one of the largest credit unions in the country with thousands of active members. Clearly therefore the existence of LCCU projects and loan facilities plays an important part in supporting the community in Leeds, and its loss would have a wide and significant impact, often upon those with the most need for such facilities. Additionally the state of the market at that time was clearly one where obtaining credit was difficult under any circumstances. As the LCCU's aim was partially to provide a service to those who could not otherwise obtain credit from formal or regulated lenders, these circumstances came to light at a time when its services were probably most required by the community.

The public interest in disclosing the information.

49. The central public interest in disclosing the information rests in creating transparency and greater accountability in the decision of the council to support the LCCU financially in this instance. The LCCU needed a significant input of public funds in order to sustain it, and very little information has been provided to explain to taxpayers the justification behind the council's decision to do this. Clearly the use of significant funds would impact upon the funds which the council holds to carry out its functions and its services, and other services may suffer as a result of this.
50. The council pointed the complainant to its policy on its social inclusion agenda as a justification for the decision to provide funds to the LCCU. This did not however provide any detail as to why public funds were necessary at this time, nor the implications and risks involved to the public purse in doing that. Some of those risks have already been highlighted above.
51. Clearly the council's decision to use, or risk public funds in this way should be as transparent as possible and it should be accountable for its decision to do that.
52. There is also a further public interest in this information being disclosed as this would highlight the checks and balances which the council took prior to agreeing to provide funds to the LCCU. This would raise confidence in the council's financial management. It might also highlight issues as to whether other options could have been considered which may have better suited the people of Leeds.
53. There is also a public interest in information on the management of the LCCU and the state it was in being disclosed. The LCCU served the population of Leeds, including those with most need, from council offices using council funds to support it. Given that the LCCU required further funding it is in the public interest for taxpayers to know how and why that position was reached.

Balance of the public interest

54. The Commissioner has considered all of the above factors and it is his decision in this case that the public interest in disclosing the information did not outweigh the public interest in maintaining confidences in this instance. Although he recognises

the very strong public interest in the information being disclosed in this instance, the nature of the information would mean that its disclosure would be likely to have a severe detrimental affect on the issue which the council was seeking to address in the first instance. His decision is therefore that the information was held under an actionable duty of confidence.

55. The Commissioner's decision is therefore that the council was correct to withhold the information under section 41 of the Act.

Section 43

56. The council also claimed that the information was exempt because section 43(2) of the Act applied. As pointed out above, not all of the information falls within the scope of section 41, and so the Commissioner has considered the application of section 43(2) to the remaining information. Section 43(2) provides that:

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

57. As discussed above, the council's argument is that a disclosure of the information would cause "real and significant risk" of prejudice to the LCCU's commercial interests by damaging investor confidence in it. The Commissioner therefore considers that the council applied the test that disclosure "would be likely" to affect the commercial interests of the LCCU.

Standard of proof

58. Where the public authority has claimed that disclosure is only likely to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), *'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk'*.
59. The Commissioner's interpretation of 'would be likely to prejudice' in section 43 cases is that there should be evidence of a significant risk of prejudice to a person's commercial interests. The degree of risk must be such that there 'may very well' be prejudice to those interests. Whether prejudice exists or not is decided on a case by case basis.

Prejudice

60. Following the Information Tribunal's decision in Hogan v ICO (EA/2005/0026, EA/2005/0030), the Commissioner uses a three step test to indicate whether prejudice would or would be likely to occur from the disclosure of the information in question.
1. identify the prejudice in the exemption
 2. consider the nature of the prejudice in question
 3. consider the likelihood of the prejudice in question occurring

1. The applicable prejudice within section 43

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

2. The nature of the prejudice in question

62. The council argues that a disclosure of the information would have led to further press stories about its problems and that that would have further heightened consumer concern about the credit union. Damaging consumer confidence in the LCCU would be likely to have led to existing members withdrawing their funds from the LCCU. Additionally new members may have been deterred from joining it in the first instance. Significantly this would have been at a time when the LCCU needed further members in order to renew positive financial trading.
63. The Commissioner has considered other arguments highlighting the prejudice which would be likely to occur, however he is unable to elaborate on these arguments further within this Decision Notice due to their nature. The Commissioner has not included this within the body of the Notice because he refers directly to information which the council has sought to exempt from disclosure.
64. The arguments are therefore held in a confidential schedule which will be provided to the council in order to further explain the Commissioner's reasoning behind his decision on this case.

3. The likelihood of the prejudice in question occurring

65. The Commissioner is satisfied that a disclosure of the information at the time of the request would have significantly increased the likelihood that the commercial interests of the LCCU would have been prejudiced. Although at the time of the request details of the financial situation had been published in the complainant's newspaper, the level of detail held in this information was available only to those

directly involved and this detail would be likely to cause further prejudice to the commercial interests of the LCCU if it were disclosed due to the nature of that information. Again this is examined further in the confidential schedule to this Decision Notice.

66. The Commissioner is therefore satisfied that a disclosure of the information would have been likely to prejudice the commercial interests of the LCCU.

The public interest test

67. Section 43 is a qualified exemption which requires that a public interest test is carried out to ascertain whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
68. Many of the arguments under in public interest test under section 43 of this case mirror those provided in the test of confidence provided above, albeit that the Commissioner recognises the difference between those tests highlighted by the Tribunal in the case of *Derry*. However the Commissioner has also identified the following further factors which are relevant to any argument to withhold the information in this case. These are aspects of public interest which relate to maintenance of the exemption in the context of the LCCU's commercial activities in areas of the community where there is a particular need.
69. The LCCU is a private body whose functions include providing access to credit facilities to those who would otherwise not be able to obtain them. The Council has in the past partially funded projects with the LCCU, and it provides it with significant premises from which to operate. It also has close historical links with it.
70. A large number of the community that work and lives in Leeds are members of the LCCU, and the council has in the past actively involved itself with the LCCU by funding various projects in partnership with the LCCU with a view to providing its LCCU services to various area of the community with an identified need for them.
71. If disclosure of this information resulted in a prevention or a reduction in its ability to do that then this would be a significant step backwards in terms of the wider context of social inclusion within the city.
72. The result would potentially be an increase in poverty within the city, and in all likelihood a corresponding increase in reliance upon unregulated doorstep lenders. The result of unregulated doorstep lenders taking a greater percentage of lending in the poorer areas of the city would be an increase in poverty in those areas rather than the intended aim of helping individuals to alleviate poverty.

Conclusion

73. The Commissioner is mindful of the strong public interest arguments for disclosure of the information, given the circumstances surrounding the case. However he is also mindful of the level of prejudice that may be caused to the commercial interests of the LCCU, and the wider effects that any such prejudice would have

on the projects with which it is involved and the communities to which it provides services. Having considered the above arguments, it is his decision that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information in this instance. Accordingly his decision is that the council was correct to apply section 43(2) to the information.

The Decision

74. 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 authority correctly applied section 41(1) to the information.
 - The authority correctly applied section 43(2) to the information.

Steps Required

75. The Commissioner requires no steps to be taken.

Right of Appeal

76. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

77. 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.
78. 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 23rd day of March 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Information provided in confidence.

41. - (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.

Commercial interests.

43. - (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).