

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2016

Public Authority: Wirral Metropolitan Borough Council
Address: Wallasey Town Hall
51 Brighton St
Wirral
CH44 8ED

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Wirral Metropolitan Borough Council ("the Council") for details of companies that had received a grant from the Council through the "Big Fund". The Council refused the request under the exemptions in section 41 (information provided in confidence) and section 43 (commercial interests).
2. The Commissioner's decision is that the section 41 and section 43 exemptions are not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The Council shall disclose the requested information to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 11 November 2015 the complainant made a request to the Council which asked for the following information.

- 1. the names of all limited company recipients of the BIG fund*
 - 2. the dates the panels awarded the grants*
 - 3. the dates councillors signed and authorised the above grants*
6. The Council failed to respond to the request despite several reminders and this led the complainant to ask the Council to carry out an internal review of its handling of the request.
7. The Council presented the findings of its review on 9 March 2016 which was in effect a refusal notice and its only response to the request. It now explained that the requested information was exempt under section 43(2) (commercial interests) of FOIA and the public interest in maintaining the exemption outweighed the public interest in disclosure.

Scope of the case

8. On 16 March 2016 the complainant contacted the Commissioner to complain about the Council's decision to refuse to disclose the information he requested.
9. During the course of the Commissioner's investigation the Council also applied the section 41 exemption (information provided in confidence). The Commissioner considers the scope of her investigation to be to consider whether the section 41 and/or section 43 exemptions apply to the complainant's request.

Reasons for decision

Section 41 – information provided in confidence

10. In this case the withheld information comprises the names of local companies who received grants in the period 2009 to 2011 by Wirral Council through its "BIG Fund" (Business Investment Grants) – a scheme to help companies through the recession and to boost local employment with grants of up to £20,000. The complainant also asked for details of when each grant was awarded and authorised. The Council has refused to disclose this information by relying on the exemptions in section 41 and 43 of FOIA. The Commissioner has first considered whether section 41 would apply.

11. Section 41 provides that information is exempt if it was obtained from another person and disclosure would give rise to a breach of confidence, actionable by that or any other person. In this case the information was held by the Council as a result of it receiving applications for grants from the various named companies. In the circumstances the Commissioner is satisfied that this is information obtained from another person.
12. As to whether disclosure would give rise to an actionable breach of confidence, the Commissioner's view is that a breach will be actionable if the following test is met:
 - i. The information has the necessary quality of confidence. (Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.)
 - ii. The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.)
 - iii. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party.
13. The withheld information in this case concerns applications for funding from the Council during an economic downturn where they had experienced problems in securing capital investment. The Commissioner would accept that information of this nature is not trivial. The Commissioner is also satisfied that, on the whole, details about which companies received grants, has not previously been disclosed. Having said that, the Commissioner is also aware that the Council has previously disclosed the names of some of the recipients of the BIG fund grants in a report it disclosed following a previous freedom of information request. Where the names of companies have not previously been disclosed the Commissioner has found that the information has the necessary quality of confidence. Where the identity of companies has already been made public the information will not have the necessary quality of confidence and the Commissioner has returned to this point below.
14. As regards the second point, an obligation of confidence can be expressed either explicitly or implicitly. In this case the Council has said that information was given to the Council in support of an application for financial assistance which it considered imported an obligation of

confidence. It suggested that vulnerable businesses were being supported by grants, having exhausted all other sources of funding and that the circumstances gave rise to an equitable obligation of confidence. It said that applications for BIG grant funding would not have been made if the applicants thought that their names and the fact that they were applying for funding would be made public.

15. The Commissioner had asked the Council to provide him with copies of any information it held relating to the procedures governing the application process. The Commissioner also asked whether the companies were given any assurances that their information would remain confidential.
16. From the information passed to the Commissioner it is clear that there was no explicit obligation of confidence. She has not seen anything to suggest that companies were given assurances that information about their applications would remain confidential. Rather, the Council appears to be arguing that there was an implicit obligation of confidence understood by both parties. The Commissioner does have some reservations about this as it could also be argued that companies in receipt of sometimes significant sums of public money might expect a degree of transparency. However, the Council consulted some of the companies who had received grants about the possibility of disclosing details about their applications. From this information and given that the applications were received from companies who would have difficulty in securing other forms of investment, the Commissioner is prepared to accept that there is a reasonable obligation of confidence and that this element of the test is met.
17. The Commissioner has now gone on to consider the potential detriment that might be caused as a result of disclosure. The Commissioner will also need to decide whether any breach of confidence would be actionable. This means that there must be a legal person able to pursue a claim for breach of confidence.
18. The Council has claimed that disclosure would be detrimental to the companies who received grants because it would cause reputational damage and damage the confidence that customers, suppliers or investors need to have in those companies.
19. The first thing to say here is that the Commissioner has seen the withheld information – a list of companies who received grants – and she has discovered that a certain number were in fact no longer trading at the time of the request. A search of Companies House has shown that certain companies were in liquidation or had been otherwise dissolved. Clearly for these companies there can be no detriment as the companies

no longer exist. Moreover, a company that is dissolved has no legal personality so there is no way any claim for breach of confidence would be actionable. There is no conceivable way the section 41 exemption could be applied to withhold the names of the companies who are no longer trading. Indeed it is worrying that the Council has sought to withhold the names of these companies as it should have been obvious that the exemption would not be engaged in such circumstances. The Commissioner would expect the Council to be aware if companies it had given financial support to were no longer trading and so it would seem unlikely that the Council were simply unaware that some companies were no longer trading.

20. This leads the Commissioner to conclude that the Council has applied the exemption in a blanket fashion without properly considering what the consequences of disclosure might be. In light of this the Commissioner has also decided that the Council has failed to demonstrate that disclosure would cause detriment to the companies who were still trading. Whilst the Commissioner is prepared to accept that the information was obtained at the time under an obligation of confidence, information will not remain confidential for ever. The grants were approved up to 7 years ago and given the passage of time the Commissioner does not accept that any detriment would be caused by revealing that a company received a grant from their local council several years earlier. This does not imply anything about the health or strength of the company today and in the Commissioner's view disclosure would be very unlikely to have any appreciable effect on the companies' reputations or the confidence of their customers, suppliers etc.
21. As she has already mentioned above, the Commissioner is also mindful that the names of some companies in receipt of grants have already been made public. Furthermore, at least one company when consulted by the Council replied to say that it was happy for its details to be disclosed. It also appears that many of the companies did not respond to the Council at all. This leads the Commissioner to conclude that the detriment which the Council argues will be caused by disclosure has been overstated.
22. Therefore without any further evidence from the Council the Commissioner must find that this part of the test has not been made out. In her view the Trust has failed to show how disclosure would cause detriment to the companies concerned and as such she has decided that section 41 is not engaged.

Section 43(2) – commercial interests

23. Section 43(2) provides that information is exempt if disclosure would or would be likely to prejudice the commercial interests of any person. The Council has applied this exemption for essentially the same reasons it believes that disclosure would be detrimental in relation to section 41 – disclosure would cause reputational damage to the companies and affect the confidence of customers, suppliers or investors.
24. The Commissioner has already explained why she is not satisfied that disclosure would cause the detriment the Council suggests. Therefore, it follows that, for the same reasons, disclosure would be unlikely to prejudice the commercial interests of the companies concerned. Consequently, the Commissioner finds that the section 43(2) exemption does not apply.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Paul Warbrick
Senior Case Officer
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