

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 19 May 2009

Public Authority: Financial Services Authority
Address: 25 The North Colonnade
Canary Wharf
London
E14 5HS

Summary

The complainant made a freedom of information request to the Financial Services Authority for any information it holds in relation to any concerns it may have regarding the management of the Leeds City Credit Union. The public authority refused to confirm or deny if it held the requested information by relying on section 31(3) (Law enforcement) and section 43(3)(Commercial Interests) of the Act and concluded that the public interest favoured maintaining the exclusion of the duty to confirm or deny. The public authority also applied section 40(5) (Personal information) but only after the Commissioner had commenced his investigation.

The Commissioner has investigated the complaint and has found that section 31(3), section 43(3) and section 40(5) are not engaged. Therefore he has found that the public authority breached section 1(1)(a) by failing to confirm or deny if the information was held and section 10 by failing to confirm or deny if he information was held within 20 working days. In its handling of the request the Commissioner found that the public authority also breached sections 17(1), 17(1)(b) and 17(1)(c) (refusal of a request). The Commissioner requires the public authority to inform the complainant if it holds the requested information and if the information is held to provide it to the complainant or else issue a refusal notice in accordance with section 17(1) of the Act. The Commissioner requires the public authority to take these steps within 35 calendar days of the date of this notice.

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 9 November 2007 the complainant wrote to the public authority and said that his newspaper, the Yorkshire Post, had recently published a series of newspaper articles regarding the management of the Leeds City Credit Union ("the Credit Union"). The complainant asked the public authority if it had any concerns regarding the articles and whether it would be taking any action in response.
3. The complainant then made a request, under the Act, for any information held by the public authority in relation to its concerns regarding the management of the Credit Union.
4. The public authority responded to the request on 7 December 2007. It said that it could neither confirm nor deny whether it had concerns regarding the management of the Credit Union and therefore whether or not it held the requested information. It said that this was because it had applied the exemption in section 31 of the Act.
5. The public authority explained the effect of the section 31 exemption and said that it had concluded that the public interest favoured maintaining the exclusion of the duty to confirm or deny. The public authority outlined its reasons for concluding that the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in confirming or denying if the information was held.
6. The public authority went on to say that if any regulatory action is taken against a firm the public are informed of the final outcome of the proceedings. It said that Final Notices are published on the FSA website www.fsa.gov.uk, and may be widely reported in the press. The public authority explained that up until that point there are statutory restrictions on what information it could disclose. It referred the complainant to section 391 of the Financial Services and Markets Act 2000 and said that it must also take into consideration the requirements of administrative law and the Human Rights Act 1998.
7. On 17 December 2007 the complainant wrote to the public authority to request that it carry out an internal review of its handling of the request. The complainant said that he thought that the public authority's response was unreasonable because it was already in the public domain that it had concerns regarding the management of the Credit Union, this having been reported by the Yorkshire Post. The complainant argued that the articles included direct quotes from letters written by the public authority to the Credit Union and also said that a spokesman from the public authority had commented directly on the case.
8. The complainant went on to say that the public authority was known to have had concerns about the Credit Union up to four years ago and therefore there was a public interest in knowing that it had taken the necessary action to address those concerns. Furthermore, the complainant argued that if it had not yet concluded any action it began taking four years ago then there would be public concern

about the regulatory role of the public authority. For these reasons the complainant contended that section 31 should not apply to his request.

9. The public authority presented the findings of its internal review on 16 January 2008. At this stage the public authority upheld the initial decision to refuse to confirm or deny if the requested information was held and said that on further consideration it believed that the section 43 exemption also applied. It went on to explain how it had reached this view.
10. The public authority clarified that it was relying on section 31(3), read in conjunction with section 31(1), to refuse to confirm or deny if it held the requested information. The public authority explained that under this exemption the duty to confirm or deny does not arise where disclosure would, or would be likely to, prejudice the exercise of its functions for the purposes of ascertaining whether:
 - any person has failed to comply with any law;
 - any person is responsible for conduct which is improper;
 - circumstances which would justify regulatory action in pursuance of any enactment exist or may arise; and/or
 - a person's fitness or competence in relation to the management of bodies corporate or in relation to any other activity which he is authorised to carry on.
11. The public authority explained that the exemption applied because disclosure of its dealings with firms would be likely to make them less willing to engage with it in an open and co-operative way. It said that whilst it did have powers of compulsion the use of these powers had disadvantages which it said included the time and resources needed for their effective deployment as well as the fact that the use of such powers presumes that it knows in advance what information it is seeking.
12. The public authority said that it appreciated that if it did not hold the requested information (i.e. it has no concerns about a firm to which a request relates) it could be argued that disclosing this would not adversely affect either its functions or the firm's commercial interests. However the public authority said that if it confirmed it did not have concerns about a firm, when that was the case, but neither confirmed nor denied that it held information when it did have concerns, then the latter response would quickly and correctly be interpreted to mean that the public authority did have concerns about a firm. Therefore it believed that it should neither confirm nor deny in both situations and it said that this observation applied equally to the section 43 exemption.
13. The public authority explained that section 43(3) provides that the duty to confirm or deny does not arise if confirming or denying if the information is held would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). It said that it considered that the commercial interests of the Credit Union are likely to be harmed by confirming or denying if the information was held. It suggested that confirmation could lead to unfair or unjustified adverse comment and speculation about the Credit Union which could affect its brand and reputation. It suggested that its ability to secure new funding could be affected as could its customers' confidence in the firm. The public

authority said that as a deposit taker any loss of confidence can have serious adverse consequences for a firm and its stakeholders.

14. The public authority noted that both section 31 and section 43 are qualified exemptions and therefore it had balanced the public interest in confirmation/denial as required by the Act. The public authority outlined the following considerations which are repeated here as direct quotations:

“Factors in favour of confirming whether or not we hold such information are that disclosure of the information would reassure the public about the effectiveness of any approach being taken by the FSA, and demonstrate that the FSA responds to concerns expressed about regulated organisations. It would also increase public understanding of the relationship between the FSA and its regulated firms. Disclosure would also provide information to consumers to assist them in making decisions about their dealings or potential dealings with regulated firms.

The factors against confirmation are:

- Disclosure to the public of any concerns the FSA might have regarding [the Credit Union] may harm our relationship with the firm, firms generally or other regulatory bodies, and restrict future exchanges of information with those bodies. Consequently, disclosure would be likely to prejudice the exercise by any public authority of its functions.
- It is in the public interest that the FSA, in the course of its regulatory duties, is able to have open and candid exchanges of information and views with its regulated firms and that any such exchanges, particularly where these firms provide to the FSA commercially sensitive information about themselves or other firms or where the FSA provides opinions, views and recommendations to firms, should remain confidential.
- If we were to confirm one way or another whether we were investigating a particular firm, this would prejudice either any immediate work we may or may not be doing and/or our ability to carry out similar inquiries effectively in the future, because firms or third parties will be less willing to engage in a full and frank dialogue with the FSA and to provide information to us on a voluntary basis.
- Such confirmation also has the potential to mislead and prejudice the financial markets and consumers, who may infer incorrectly either misconduct or a clean bill of health from the mere fact that we may or may not be carrying out an investigation at any one point in time. Over-interpretation by the public of the fact that the FSA has concerns about a firm could result in its businesses being harmed in circumstances where a remedial plan could have been satisfactorily implemented over time.
- The result could be a reduction in co-operation from firms or third parties with the FSA, which would harm the FSA's efficiency and effectiveness in carrying out its regulatory functions, as firms would be less willing to accept shortcomings and take remedial action (which may involve compensation to

- consumers) without formal action by the FSA, if the fact that regulatory discussions had been held were to be made publicly available.
- If any regulatory action is taken against a firm, the public is informed of the final outcome of the proceedings. Final Notices are published on the FSA website, and may be widely reported in the press.”
15. The public authority concluded that confirming or denying if information was held would affect its ability to supervise firms effectively and efficiently, and has the potential to mislead the public about regulated firms. It said that in its view the balance of the public interest came down in favour of neither confirming nor denying if the information was held.
16. On a final point, the public authority said that Section 348 of the Financial Services and Markets Act 2000 restricts the disclosure of ‘confidential information’ it has received except in certain limited circumstances. It said that confidential information is defined as information which relates to the business or other affairs of any person and was received by the public authority for the purposes of, or in the discharge of, its functions under the Financial Services and Markets Act 2000. It pointed out that disclosure of information in breach of the Financial Services and Markets Act was a criminal offence. Consequently, were it to hold any information in relation to the request, the public authority said that section 44 would apply as it provides for any exemption from the Act where disclosure is prohibited under any other law or enactment.

The Investigation

Scope of the case

17. On 21 January 2008 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 public authority’s decision to refuse to confirm or deny if it held the requested information by relying on the exemptions in section 31 and 43 of the Act. In particular the complainant said that he believed that the existence of the information he requested was already in the public domain and he repeated his claims that disclosure would serve the public interest.
18. The Commissioner wishes to stress that his decision is based on the facts as they stood at the time the request was received by the public authority. The Commissioner considers that information relating to this issue has entered the public domain subsequent to the public authority receiving the request. However the Commissioner can not take this into account when reaching his decision on whether the public authority dealt with the request in accordance with the Act.

Chronology

19. The Commissioner wrote to the public authority with details of the complaint on 2 December 2008. First of all the Commissioner outlined his understanding of the public authority's application of section 31. He said that section 31(3) provides that the duty to confirm or deny does not arise if compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters listed in subsection 31(1). The Commissioner said that it appeared to him that the public authority was relying on section 31(1)(g) as confirming or denying if it holds the requested information would, or would be likely to, prejudice the exercise of its functions for one or more of the purposes listed in section 31(2). The Commissioner asked the public authority to let him know if his understanding was not correct.
20. The Commissioner recognised that the public authority had provided detailed reasons why section 31(3) applied but invited it to provide any further explanation as to why confirming or denying if the information was held would, in itself, prejudice its exercise of its functions.
21. As regards section 43 the Commissioner again invited the public authority to provide any further explanation of why confirming or denying if the requested information was held would, in itself, prejudice the commercial interests of the Credit Union.
22. Finally, the Commissioner invited the public authority to make any further representations in support of its handling of the request and also asked it to comment on the complainant's argument that the fact that it had concerns regarding the management of the Credit Union was already in the public domain.
23. The public authority responded to the Commissioner on 6 January 2009. The public authority now confirmed that it was relying on section 31(3), read in conjunction with section 31(1)(g) and section 31(2)(a-d), to refuse to confirm or deny if the information was held.
24. In addition to the arguments advanced in the refusal notice and at the internal review the public authority now outlined further reasons why it considered that confirming or denying if the information was held would be likely to prejudice the exercise of its functions for one or more of the purposes listed in section 31(2) and prejudice the commercial interests of the Credit Union.
25. Commenting on the complainant's suggestion that the fact that the existence of the requested information was already in the public domain, the public authority said that articles in the press do not amount to more than speculation in the absence of reliable support or confirmation. In this particular case it said that this would come from either itself or the Credit Union. It confirmed that it had not provided any confirmation to the Yorkshire Post and, to the best of its knowledge, neither had the Credit union.
26. On a final point, the public authority also suggested that confirming or denying if the information was held would also engage the section 40 exemption. It explained that there are a finite number of people within the Credit Union who could be considered as part of its management. In light of this it thought that a

concern about the management of the Credit Union could therefore be interpreted as a concern about any one of these individuals. Given that they would not expect such information to be disclosed, other than by following the procedures in the Financial Services and Markets Act 2000, it believed that confirmation or denial would be in breach of the first data protection principle, which requires that personal data be processed fairly and lawfully.

27. The Commissioner contacted the public authority again on 12 February 2009 and said that he was aware of information relating to this issue which had now entered the public domain. In light of this the Commissioner asked if the public authority was prepared to reconsider its decision to refuse to confirm or deny.
28. The public authority responded to the Commissioner on 10 March 2009. Having considered the Commissioner's suggestion the public authority said that it was not prepared to reconsider its 'neither confirm nor deny' approach.

Findings of fact

29. 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.¹ 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.
30. The 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 in 1996 and in 2001 it expanded its common bond to include everyone who lives or works in the Leeds Metropolitan District.
31. The Credit Union is regulated by the public authority which is also responsible for monitoring its performance.
32. A series of articles were published in the Yorkshire Post newspaper on 3 November 2007 alleging mismanagement of the Credit Union. The articles referred to letters from the public authority to the Credit Union which appeared to suggest that the public authority had concerns about the Credit Union's management.²
33. Principle 11, (relations with regulators) of the Public authority's Principles for Businesses states:

¹ Source: <http://www.abcul.org/page/about/intro.cfm>

² <http://www.yorkshirepost.co.uk/news/Inquiry-into-rule-breaches-by.3442614.jp>,
<http://www.yorkshirepost.co.uk/news/Too-much-power-in-chief39s.3442520.jp>

“A firm must deal with its regulators in an open and co-operative way, and must tell the FSA promptly anything relating to the firm of which the FSA would reasonably expect prompt notice.”³

34. Section 391(4) of the Financial Services and Markets Act 2000 (“the FSMA”) provides that:

“The authority must publish such information about the matter to which a final notice relates as it considers appropriate”.

Analysis

35. A full text of the relevant provisions from the Act is contained within the legal annex.

Procedural matters

Section 17 – Refusal of a request

36. At the internal review stage the public authority stated that it was relying on section 31(3) in conjunction with section 31(1)(g), and specified which of the functions at section 31(2) would or would be likely to be prejudiced. By failing to cite this detail within 20 working days the public authority breached section 17(1) of the Act.
37. At the internal review stage the public authority said that it was also relying on section 43(3) to refuse to confirm or deny if the information was held. By failing to cite this exemption within 20 working days the public authority breached section 17(1) of the Act.
38. The public authority only introduced its reliance on section 40 when the Commissioner wrote to the public authority with details of the complaint. By failing to cite this exemption within 20 working days the public authority breached section 17(1) of the Act. By failing to cite the exemption and explain why it applied by completion of the internal review the public authority also breached section 17(1)(b) and section 17(1)(c).

Exemption

Section 31(3) – Law enforcement

39. Section 31(3), when read with section 31(1)(g), provides that the duty to confirm or deny does not arise if compliance with section 1(1)(a) would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).

³ <http://www.fsa.gov.uk/pubs/policy/cp13rp.pdf>

40. The public authority has said that it considers that the relevant purposes in section 31(2) are:
- (a) the purpose of ascertaining whether any person has failed to comply with the law,
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
 - (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on.
41. The public authority has not explicitly said whether by confirming or denying if the information is held, prejudice would or would be likely to occur. In light of this the Commissioner thinks that in assessing the level of prejudice at which the exemption is engaged it is appropriate to use the lesser test, that it is to say the exemption will be engaged if confirming or denying if the information is held would be likely to prejudice the public authority's ability to exercise its functions.
42. The Commissioner considers that in order for the exemption to be engaged the likelihood of prejudice must be real. In particular the Commissioner is mindful of the comments of the Information Tribunal in *John Connor Press Associates v Information Commissioner* in which it stated that:
- "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."*⁴
43. This interpretation follows the Judgement of Mr Justice Munby in the High Court in which 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."*⁵
44. The public authority's reason for engaging the exemption is essentially that confirming or denying if the information is held would be likely to prejudice any immediate work it may or may not be doing with the particular company and would prejudice its ability to carry out similar work in future. It contends that were it to confirm or deny then companies which it regulates would be less likely to engage with it on an informal basis in the future. Therefore it would need to devote increased resources to carrying out investigations on a more formal basis which would adversely affect the speed at which its investigations could be carried out and concluded.

⁴ John Connor Press Associates v Information Commissioner [EA/2005/005], para. 15.

⁵ R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 Admin

45. The Commissioner recognises the importance of a regulator such as the public authority being able to engage with the bodies it regulates on an informal basis, for the reasons it has given, and appreciates that carrying out investigations on a more formal basis has resource implications. The Commissioner is prepared to accept that if, at the time the request was received, the public authority was conducting an investigation into the Credit Union any reluctance on its part to engage with the public authority on an informal basis would be likely to prejudice the exercise of its functions for one or more of the purposes listed in subsection 31(2)(a) – (d). Similarly the Commissioner accepts that if companies, in general, proved more reluctant to deal with the public authority on an informal basis this would be likely to similarly prejudice the exercise of its functions.
46. However, the Commissioner is not convinced that regulated firms would behave in this way as a result of the public authority confirming or denying if the requested information was held. In reaching this view he is mindful of the findings of the Information Tribunal in the case of *Financial Services Authority v Information Commissioner* in which it considered whether disclosing information about the public authority's investigations would affect the willingness of regulated firms to engage and co-operate with the public authority on a voluntary basis.⁶ It concluded that the risk of this occurring was slight and not sufficient to warrant maintaining the exemption. It highlighted the following reasons for reaching this view which the Commissioner also considers to be relevant in this case:
- *“The incentives on firms to supply information about themselves and generally to co-operate with the FSA, namely (a) principle 11 of the FSA’s Principles for Business which requires them to do so and (b) their desire to mitigate any steps taken against them and avoid formal enforcement action formal enforcement action, would have remained in place even if disclosure of the disputed material in this particular case would have led them to believe that the FSA’s views based on such information might one day possibly have to be disclosed pursuant to the request under the Act.*
 - *“There is always a risk of firms (of which they must be aware) that, if they supply information about themselves voluntarily, not only the FSA’s views but the information itself will ultimately come to be published pursuant to section 391(4) of the FSMA.”*
47. The Commissioner would also stress that in the case before the Tribunal the prejudice being considered was that which would result from the actual disclosure of information regarding allegations about a particular regulated company. Therefore the Commissioner considers that the Tribunal's findings carry even more weight in this case given that the concern here is what prejudice would be caused by merely confirming or denying if information was held, rather than the actual disclosure of that information.
48. Furthermore, the Commissioner notes that the allegations made in the Yorkshire Post regarding the management of the Credit Union date from 2003 and 2004 where as the complainant submitted his request to the public authority in

⁶ Financial Services Authority v Information Commissioner [EA/2008/0061], para. 24.

November 2007. Therefore, it is reasonable to conclude that any investigation which the public authority may or may not be carrying out would be likely to be at an advanced stage or at least would be unlikely to be at an elementary stage. The Commissioner is of the opinion that informal co-operation with a firm is likely to be more important during the early stages of an investigation. Therefore, even if the Commissioner were to accept that disclosure would lead to the Credit Union being unwilling to co-operate with the public authority, which he does not, it is unlikely that this would cause any significant prejudice to an investigation which would in all likelihood be at an advanced stage.

49. For the reasons given above the Commissioner is not satisfied that confirming or denying if the requested information is held would prejudice the public authority's functions for one or more of the purposes listed in section 31(2) of the Act. Therefore the Commissioner finds that the exclusion of the duty to confirm or deny as provided for in section 31(3) of the Act is not engaged.

Section 43(3) – Commercial interests

50. Section 43(3), read in conjunction with section 43(2), provides that the duty to confirm or deny does not arise if disclosure would, or would be likely to, prejudice the commercial interests of any person.
51. The public authority has argued that the section 43 exemption applies because confirming or denying if the information is held would be likely to prejudice the commercial interests of the Credit Union for the following reasons:
- It could lead to unfair or unjustified adverse speculation about the Credit Union which in turn could affect the firm's brand and reputation.
 - It could affect its ability to raise funds.
 - It could cause a loss of confidence in its customers and potential customers.
52. The public authority has not said if the arguments for engaging the exemption are shared by the Credit Union. Instead it appears that these arguments have been advanced by the public authority on behalf of the Credit Union. Therefore in deciding what weight to attribute to these arguments the Commissioner is mindful of the comments of the Information Tribunal in the case *Derry City Council v Information Commissioner*.⁷ In that case the Tribunal rejected Derry City Council's argument that disclosure of the requested information would prejudice the commercial interests of a third party, Ryanair. This is because the Tribunal had not been provided with any direct evidence from Ryanair to support this argument.
53. The Commissioner understands that the decision of the Tribunal could be taken to mean that arguments as to what prejudice could be caused by disclosure can be given less weight when advanced on a speculative basis by a public authority.
54. Having said this, in contrast to the Ryanair case, the Commissioner is prepared to accept that if the public authority confirmed it had concerns about a particular firm

⁷ Derry City Council v Information Commissioner [EA/2006/0014]

there is at least the possibility that it could have the effects described above. However, in this particular case allegations regarding the management of the firm have already been made in an influential local newspaper. Therefore, it is reasonable to conclude that prejudice has already been caused as a result of publication. The Commissioner notes that the article referred to sources within the public authority and Credit Union that appeared to corroborate the allegations.

55. The Commissioner accepts that an official statement from the public authority confirming it had concerns regarding the Credit Union is likely to be viewed more seriously and generate more publicity. Therefore it is a possibility that disclosure could fuel any speculation and could make any loss of confidence worse. However, the Commissioner is not convinced that the likelihood of this happening is sufficient to meet the test for engaging the exemption. As noted at paragraphs 40 and 41 above, the Commissioner considers that in order for the exemption to be engaged there should be a real and significant risk of prejudice occurring. Therefore even when the lesser test of “would be likely to prejudice” is applied the Commissioner is of the opinion that the likelihood of any further prejudice occurring is not sufficient to warrant maintaining the exclusion of the duty to confirm or deny.
56. The Commissioner has decided that the exclusion of the duty to confirm or deny as provided for in section 43(3) is not engaged.

Section 40(5) – Personal information

57. When contacted by the Commissioner with details of the complaint the public authority said that it was also seeking to rely on the exemption in section 40 of the Act. The public authority failed to cite which specific sub-section of the exemption it is relying on although the Commissioner understands that its grounds for applying the exemption is that confirming or denying would contravene the data protection principles. Therefore the Commissioner considers that section 40(5) is the relevant provision.
58. Section 40(5) provides that the duty to confirm or deny does not arise in relation information where giving confirmation or denial would contravene any of the data protection principles. The public authority has said that in this case it is the first principle, which states that personal data shall be processed fairly and lawfully, that is relevant.
59. In order for this exemption to be engaged it is first necessary to consider whether confirming or denying if the information is held would constitute the disclosure of personal data. Personal data is defined in the Data Protection Act 1998 as:

*“...data which relate to a living individual who can be identified –
(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

60. The public authority has argued that there are only 17 members of staff within the public authority who could be described as being part of its “management”. Therefore it has suggested that confirming or denying if it had concerns about the management of the Credit Union could be interpreted as a concern about the 17 named individuals.
61. The Commissioner rejects this analysis. The Commissioner notes that in making his request to the public authority the complainant did not refer to any one individual but instead asked the public authority if it had concerns regarding the “management” of the Credit Union, as opposed to “managers” within the Credit Union. If the public authority confirmed or denied it had concerns about the management of the Credit Union then this could be seen by some as a reflection on individual managers. However, given the wording of the request the Commissioner does not accept that this would amount to the disclosure of personal data. If the management of the Credit Union was limited to one or two persons the Commissioner would have been more inclined to accept the public authority’s contention that because of the finite number of individuals confirming or denying if the information was held would lead to an individual being identified. However the Commissioner is satisfied that in this case the sample size of 17 people is sufficiently large to prevent any one individual being identified.
62. The Commissioner does not accept that confirming or denying if the information is held would constitute the disclosure of personal data. Therefore the Commissioner has found that the exclusion of the duty to confirm or deny, as provided for in section 40(5), is not engaged.

The Decision

63. The Commissioner’s decision is that the public authority did not deal with the request for information in accordance with the Act:
 - The public authority breached section 17(1) of the Act by failing to specify that it was relying on section 31(3) and by failing to properly state why the exemption applied, within 20 working days of receiving the request.
 - The public authority breached section 17(1) of the Act by failing to cite its reliance on section 43(3) within 20 working days of receiving the request.
 - The public authority breached section 17(1) of the Act by failing to cite its reliance on section 40(5) within 20 working days of receiving the request. The public authority also breached section 17(1)(b) and section 17(1)(c) by failing to cite the exemption and explain why it applied by completion of the internal review.

- The public authority breached section 1(1)(a) of the Act by failing to confirm or deny if the requested information was held by incorrectly relying on sections 31(3), 43(3) and 40(5) of the Act. It also breached section 10 by failing to confirm or deny if the information was held within 20 working days.

Steps Required

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

- The public authority shall, in accordance with section 1(1)(a) of the Act, inform the complainant if it holds the information he requested on 9 November 2007.
- If the public authority holds the requested information it shall either disclose that information to the complainant or else issue a refusal notice in accordance with section 17(1) of the Act.

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

Failure to comply

66. 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.

Other matters

67. At the internal review stage the public authority set out the arguments it had taken into account when considering the public interest test. However the public authority did not explicitly state which arguments applied to which exemption. Whilst this did not cause any particular problems in this case the Commissioner wishes to stress that he expects public authorities to consider the public interest inherent to each exemption and no aggregation of the public interest test should take place.

Right of Appeal

68. 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 19th day of May 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

**Information Commissioner's Office
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Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

- (a) the provision confers absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Section 17(1) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

Section 31(2) provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.”

Section 31(3) provides that –

“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 any of the matters mentioned in subsection (1).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

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).”

Section 43(3) provides that –

“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).”