

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 November 2022

Public Authority: Thurrock Council

Address: Civic Offices
New Road
Grays
RM17 6SL

Decision (including any steps ordered)

1. The complainant has requested information about investments Thurrock Council ('the Council') has made in the renewable energy sector. The Council disclosed some information, but it refused to disclose the remainder, citing sections 36(2)(c) (Prejudice to effective conduct of public affairs), 41 (Information provided in confidence) and 43(2) (Commercial interests) of FOIA.
2. The Commissioner's decision is that sections 41 and 43(2) of FOIA are not engaged. Section 36(2)(c) is engaged, but the public interest favours disclosure. The Council breached sections 1 and 10 of FOIA by failing to respond to the request within the 20 working day time for compliance.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the information requested at parts (2A) – (2G) of the request.
4. The Council 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 pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Background

5. In 2020, it was reported that the Council had borrowed £420 million in order to invest in the solar energy market. Recently, in September 2022, due to concerns about the scale of the financial and commercial risks potentially facing the Council, the government appointed Essex County Council to oversee its financial functions and to assess whether there has been a best value failure in its other functions¹.
6. This is a follow-up request to ones which the Commissioner, and the First-tier Tribunal, have previously considered. The Tribunal's decision on the earlier requests can be found online².

Request and response

7. On 29 April 2021, the complainant wrote to the Council and requested information in the following terms:

"I am emailing to request the following information under the Freedom of Information Act 2000.

1) As of 29/04/2021, what was the council's total investment in the renewable energy sector?

2) Can you provide a breakdown of the individual investments that make up the figure provided in response to question (1) including for each:

A) The amount of money invested by the council

B) The date on which the investment took place

C) The recipient of the money

D) The type of investment (bond, releveraging of existing investment, stock, mutual fund, etc)

E) The date on which the investment will mature

F) The name of the entity which issued the bond(s) (if applicable)

G) The name and location of the associated asset

H) The name of the broker (or any equivalent entity) which notified

¹ <https://www.gov.uk/government/collections/intervention-at-thurrock-council>

² [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3100/Davies,%20Gareth%20\(EA.2020.0241%20and%20EA.2020.0242\)%20Part%20Allowed.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3100/Davies,%20Gareth%20(EA.2020.0241%20and%20EA.2020.0242)%20Part%20Allowed.pdf)

the authority about the investment opportunity

I) How the investment was financed (short-term borrowing from local authorities, PWLB, reserves, etc)."

8. The Council responded to the request on 18 August 2021. It provided the total investment figure requested at part (1) of the request (£749,506,153).
9. For part (2) of the request, it disclosed the information requested at parts (2H) and (2I). It said that the information requested in the remaining points of part (2) of the request was exempt from disclosure under sections 36(2)(c), 41, and 43(2) of FOIA.
10. The Council told the complainant that if he was dissatisfied with its response he should complain directly to the Commissioner.

Scope of the case

11. The complainant contacted the Commissioner on 9 September 2021 to complain about the way his request for information had been handled. He disagreed with the Council's application of sections 36(2)(c), 41 and 43(2) to refuse parts (2A) – (2G) of the request.
12. He told the Commissioner:

"In recent years, the Council has borrowed large sums of money, primarily from other public authorities...they were invested in financial schemes, in the hope of achieving a financial return, in a practice known as "borrowing in advance of need"... There is an obvious public interest in scrutiny and democratic accountability of these financial decisions".
13. In view of the background to this matter, the Commissioner did not require the complainant to seek an internal review before accepting the complaint for investigation.
14. The complainant alleged that the Council's conduct breached local authority guidance and codes of practice. However, the Commissioner cannot consider such allegations. 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 I of FOIA.
15. The analysis below considers the application of sections 36(2)(c), 41 and 43(2) of FOIA to refuse parts (2A) – (2G) of the request.

Reasons for decision

16. In its response to the Commissioner, the Council said it was relying on the submissions and evidence it had recently provided to the First-tier Tribunal, in respect of its application of sections 36 and 43 to the complainant's previous requests.

17. Commenting on the similarity between the requests, the Council said:

"As a preliminary point, it should be noted that the information requested...(investment and borrowing breakdowns) is essentially the same as the information currently being considered by the First-tier tribunal. The only difference is that the case before the tribunal requires consideration of the investment and borrowing figures as at an earlier point in time (i.e. the date on which [complainant's name redacted] made his original information requests). However, there has been no change in the Council's investments since that date...

...

The Council's position in relation of all of the requests, therefore, is exactly the same as in the cases before the tribunal...Accordingly, the Council relies on the submissions and evidence provided in those proceedings to the fullest possible extent..."

Section 36(2)(c) – Otherwise prejudice the effect conduct of public affairs

18. Section 36(2)(c) of FOIA states that information is exempt if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. The Council has applied section 36(2)(c) to withhold the information it holds in respect of parts (2A) – (2G) of the request.

19. The Commissioner's guidance on section 36³ states that section 36(2)(c) is concerned with the effects of making the requested information public. Information may be exempt under section 36(2)(c) where disclosure could have:

³ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

"...an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure."

20. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that the Council's Monitoring Officer is authorised as the qualified person under section 36(5) of FOIA and that he gave the opinion that the exemption was engaged. He did so on the basis that if the information was disclosed, "there would, or would be likely, to be an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose".
21. The qualified person reached this conclusion on the basis that disclosure would be likely to undermine and distort the bonds market, where the Council's investments are focussed, which would reduce profitability and "be significantly detrimental to the Council's ability to set a balanced budget and, consequently, the Council's ability to offer an effective public service."
22. The Commissioner accepts that it was reasonable for the qualified person to consider it necessary to protect the value of the Council's investments, in order to secure the end result of offering an effective public service. He also accepts that at least some form of prejudice 'would be likely to' result from the disclosure of the withheld information, if only in the form of the diversion of Council resources to manage and respond to the media interest likely to be generated by the information. He is therefore satisfied that the exemption is engaged on that basis.

Public interest test

23. Section 36 is a qualified exemption, meaning that it is necessary to determine whether the public interest favours maintaining the exemption or disclosing the information.

Public interest arguments favouring disclosure

24. The complainant argued that there is an overwhelming public interest in disclosing the information, explaining:
 - "a. The information relates to public finances, and in particular financial practices involving huge amounts of public debt where the risk is ultimately borne by the public.

- b. The practice of borrowing in advance of need by local authorities is prohibited by guidance, and at the very least should be subject to particular safeguards.
 - c. More specific information enables more specific scrutiny and greater public understanding of the ways in which public money is being put at risk.
 - d. This is a sphere of activity which already suffers from a deficit of scrutiny.
 - e. The information sheds light broader [sic] questions of public interest, including the chronic underfunding of local authorities.”
25. The Council acknowledged there is a legitimate public interest in the external scrutiny of its borrowing and investments.

Public interest arguments favouring maintaining the exemption

26. The Council argued that the public interest in transparency and accountability regarding its borrowing and investment activities was served by way of the statutory audit provisions it is subject to, and with which it fully complies.
27. It also argued that the value of the investments was so high that the public interest fell in favour of protecting them from any harm which might flow from disclosure, as they represented a significant source of income for the Council.

Balance of the public interest

28. Having viewed the withheld information, which he considers provides a broad overview of the Council's investment activity, the Commissioner is not satisfied that the potential harm the Council envisages justifies withholding the information. Specifically, he is not convinced that the withheld information is so sensitive that the arguments for withholding it are capable of overcoming the significant public interest in transparency and accountability regarding the amount of public money the Council has borrowed and invested.
29. The Commissioner is mindful that, as set out above, the Council's submissions to him are the same as those it recently made to the Tribunal on a substantially similar request for information it had refused under section 36 of FOIA. In that case, the Tribunal found that, as regards information which was the same as that requested in parts (2A), (2B), (2C), (2D), (2E) and (2G) of this request (albeit for the previous year), the public interest in disclosure outweighed that in favour of maintaining the exemption. The Tribunal's analysis of the Council's position can be found at paragraphs 73 – 83 of its decision and so the

Commissioner will not reproduce it here. However, the Tribunal placed considerable weight on the need for accountability in relation to “the exceptional scale of the Council’s financial dealings”.

30. The Commissioner has seen no information which causes him to deviate from the Tribunal’s decision. He has also seen no arguments which convince him that the public interest in withholding the information requested at part (2F) (the identity of bond issuers) outweighs the public interest in disclosure. This is information of a type which the Council has previously disclosed, in 2016, and which, as set out above, addresses the significant public interest in accountability regarding the Council’s investment activities.
31. The Commissioner’s decision is therefore that although section 36(2)(c) is engaged, in this case, the public interest favours disclosure.

Section 43 – Commercial interests

32. Section 43(2) of FOIA states that information is exempt if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
33. A public authority must be able to show how and why its disclosure has the potential to prejudice someone’s commercial interests. The prejudice can be to the commercial interests of any person (an individual, a company, the public authority itself or any other legal entity).
34. In order for section 43(2), to be engaged, three criteria must be met:
 - the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed must relate to someone’s commercial interests.
 - the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
 - the level of likelihood of prejudice being relied upon by the public authority must be met (ie it must be shown that disclosure would, or would be likely to, result in prejudice occurring).

35. The Commissioner's guidance on section 43⁴ states that a commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.
36. The Council argued that its investment position would be adversely affected, in that it could expect to incur increased costs and reduced returns if the information was disclosed. It also argued that the commercial interests of bond issuers would be damaged by the disclosure of information which would be of interest to their competitors, particularly when seeking to refinance the investments, and that they would suffer reputational damage which would be stigmatising to their commercial position.
37. As set out above, the Tribunal recently considered these arguments in respect of identical requests for information made around 18 months earlier. As regards section 43, its decision stated:

"We are not persuaded that publication of the information sought...would, or would be likely to, prejudice the commercial interests of the Council or any relevant third party. In particular, we see no, or at most very little, commercial sensitivity in the identities of the parties with whom the Council has entered into borrowing, lending and investment transactions, the general nature of those transactions, the sums involved, the duration of the various contracts, the forms of finance employed and, in the cases of investments, the sources of information which led the Council to enter into the relevant transaction with the party concerned. The fact that the Council and, no doubt, some – perhaps most – of the contracting parties, would prefer this information to be suppressed is plainly not, by itself, a reason to hold that the exemption is engaged. The evidence does not, in our view, bridge the substantial gap between an unfulfilled preference or even expectation of privacy and real, actual and substantial prejudice to commercial interests."

38. The Tribunal further commented:

"...we consider that the information sought, other than the interest rate and forecast returns information, is not commercially sensitive and does not merit protection on any other special ground."

⁴ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

39. The Tribunal found that, in the cases it was considering, information on interest rates and forecasted returns did engage the exemption at section 43. However, questions (2A) – (2G) of this request do not ask for that information.
40. Although the Commissioner considers each complaint to him on a case-by-case basis, in this case the Council has argued that the request falls to be considered on the same evidence and arguments as it submitted to the Tribunal. That being the case, as with section 36, the Commissioner has not been presented with any countering arguments which would cause him to take a different view to the Tribunal, regarding the engagement of section 43.
41. His decision is therefore that the exemption at section 43 of FOIA is not engaged in respect of questions (2A) – (2G) of the request.

Section 41 – Information provided in confidence

42. Section 41(1) of FOIA states that information is exempt information if the information was (a) obtained by the public authority from another person and (b) its disclosure would constitute an actionable breach of confidence.
43. The Commissioner's guidance on section 41 states:
- “...information will be covered by section 41 if –
- it was obtained by the authority from any other person,
 - its disclosure would constitute a breach of confidence,
 - a legal person could bring a court action for that breach of confidence, and
 - that court action would be likely to succeed.”

Was the information obtained from any other person?

44. Section 41(1)(a) states that the information must have been obtained from “any other person”. The term means a ‘legal person’. The Commissioner's guidance explains that this could be an individual, a company, another public authority or any other type of legal entity.

45. The Commissioner's guidance⁵ on this point states:

"... the exemption won't cover information the authority has generated itself, although it may cover documents (or parts of documents) generated by the public authority if these record information provided in confidence by another person ...".

46. The Commissioner is not satisfied that the withheld information in respect of parts (2A) – (2D) of the request constitutes information which was obtained from another person. It is information about an investment contract the Council has entered into with a third party, the terms of which will have been mutually agreed by the respective parties, rather than provided by one party to another.

47. That being the case, he is satisfied that section 41 of FOIA is not engaged by parts (2A) – (2D) of the request.

48. The Commissioner's remaining consideration of section 41 is restricted to the withheld information at (2E), (2F) and (2G) which he is satisfied comprises information which was obtained from another person.

Would disclosure constitute a breach of confidence?

49. As regards the withheld information in respect of parts (2E), (2F) and (2G), the Commissioner considered whether disclosure would constitute a breach of confidence. To do so, the withheld information must have the necessary quality of confidence. Information will possess the necessary quality of confidence if it is more than trivial and not otherwise accessible. The Commissioner's guidance on section 41 states that the information should be worthy of protection in the sense that someone has a genuine interest in its contents remaining confidential.

50. The Tribunal did not consider the application of section 41 when considering the aforementioned requests. However, when considering the application of section 43, the Tribunal was emphatic that information which was the same as that requested at parts (2E), (2F) and (2G) of this request, was not significantly commercially sensitive (see paragraphs 37 and 38, above).

51. The Tribunal also noted that, in 2016, the Council was apparently willing to disclose information about its investment in the renewable energy

⁵ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

sector and to name its bond issuer without considering that this breached any duty of confidence.

52. The Commissioner is not satisfied that the bond repayment date, name of the bond issuer, or the name and location of the associated asset, is information which has the necessary quality of confidence. He has also not been provided with information which demonstrates that there would be significant detriment to the confider, if it were disclosed.
53. The Commissioner is therefore not satisfied that section 41 of FOIA is engaged in respect of parts (2E), (2F) and (2G) of the request.

Commissioner's decision

54. The Commissioner's decision is that the Council was not entitled to apply sections 36(2)(c), 41 and 43 of FOIA to withhold the information at parts (2A) – (2G) of this request. It should therefore take the action specified at paragraph 3.

Section 10

Section 1 – general right of access **Section 10 – time for compliance**

55. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
56. Section 10(1) of FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
57. The complainant submitted his request on 29 April 2021 and the Council responded to it 77 working days later, on 18 August 2021. The Council therefore breached sections 1(1) and 10(1) by failing to respond to the request within 20 working days.
58. The Commissioner has made a note of this for monitoring purposes.

Other matters

Other requests for information submitted by the complainant

59. The Commissioner acknowledges that he has rejected the Council's application of exemptions in this case, when he has reached a different conclusion regarding the application of section 43 of FOIA to another request that the complainant also submitted to the Council⁶. In that case, he found that the Council was entitled to withhold the information in question (which was highly detailed, comprising various bond prospectuses and correspondence between the Council and bond issuers, together with accompanying assessments, contracts and performance reports).
60. When dealing with complaints submitted to him, the Commissioner will consider the facts presented to him, on a case-by-case basis. The particular circumstances of each request will vary, according to such factors as what information has been requested, how detailed it is and the wider public interest that would be served by the information being disclosed. Any, or all, of these factors may lead to a different conclusion as to whether or not, in a particular case, information is exempt from disclosure.

⁶ Dealt with under reference IC-128396-J6Q7

Right of appeal

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

62. 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.
63. 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

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