

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 borrowing that Thurrock Council ('the Council') has undertaken to finance its investments 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) and 43(2) (Commercial interests) of FOIA.
2. The Commissioner's decision is that Thurrock Council is entitled to rely on section 36(2)(c) of FOIA to withhold information on the interest rates it was charged by lenders. However, for the remaining information, he finds that while section 36(2)(c) is engaged, the public interest favours disclosure. He finds that section 43(2) of FOIA is not engaged. 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 (2), (2.1), (2.2), (2.4) (2.5) and (3) of this 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 outstanding debt relating to loans from other local authorities/public bodies?

2) In relation to the answer to question (1) I would like to know:

For each individual loan taken by the council:

2. The local authority/lender name

2.1 The amount advanced (the initial amount received)

2.2 The outstanding balance

2.3 The interest rate

2.4 The settlement date (the date the loan was agreed)

2.5 The agreed maturity date (the date on which the loan is set to end)

2.6 Brief summary of the purpose of the loan

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)

2.7 Any platform used during the borrowing process (for example iDealTrade.net)

3) At a Corporate Overview and Scrutiny Committee meeting on 10/11/2020, [redacted], the council's director of finance, told the committee "every time there has been negative press coverage of the council's borrowing and investments some bodies who have lent to Thurrock over a number of years have removed Thurrock from their lending list". Furthermore, in a submission relating to '[redacted] v ICO and Thurrock' in April 2021, the council wrote: "Since these proceedings began, the council has had to borrow £425m from the PWLB [Public Works Loan Board] as it could not finance this in the local authority market".

Bearing these two points in mind, can the council list since 01/04/2020, the local authorities or other public bodies which, having previously loaned money to Thurrock Council, have stopped doing so?"

8. The Council responded to the request on 18 August 2021. It disclosed the figure requested at part (1) of the request (£766,500,000). It provided information which addressed part (2.6) of the request. It said it did not hold any information in respect of part (2.7) of the request.
9. It said the information it held in respect of parts (2), (2.1), (2.2), (2.3), (2.4), (2.5) and (3) of the request was exempt from disclosure under sections 43(2) and 36(2)(c) 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) and 43(2) to refuse parts (2), (2.1), (2.2), (2.3), (2.4), (2.5) and (3) of the request.

12. The complainant 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) and 43(2) of FOIA to refuse parts (2), (2.1), (2.2), (2.3), (2.4), (2.5) and (3) 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).

...

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 (2), (2.1), (2.2), (2.3), (2.4), (2.5) and (3) 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:

"...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 "significantly detrimental to the Council's ability to set a balanced budget". Disclosure, he argued, would adversely impact the Council's working relationships with lenders, weaken its ability to be able to negotiate competitively in the future, reducing the available spend it has and causing the Council to suffer reputational damage due to loss of lenders' confidence in it.
22. The Commissioner accepts that it was reasonable for the qualified person to consider it necessary to protect the Council's ability to borrow competitively, 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.

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

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 borrowing to fund investments, the Commissioner is not satisfied that the potential harm the Council envisages justifies withholding the information. Specifically, he is not

convinced that the majority of 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 are the same as those it recently made to the Tribunal regarding a substantially similar request for information it had refused under section 36. In that case, the Tribunal found that, as regards information which was the same as that requested in parts (2), (2.1), (2.2), (2.4) and (2.5) 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 would cause him to deviate from the Tribunal's decision.
31. As regards the information requested at part (3) of the request (the identities of former lenders), while the Commissioner recognises that disclosing the identities of former lenders could undermine any ongoing relationships the Council has with them, and its own reputation as a borrower, the Commissioner is mindful of the very strong public interest in transparency that has already been identified, in light of the scale of the Council's financial dealings.
32. The Commissioner's decision is, therefore, that for parts (2), (2.1), (2.2), (2.4), (2.5) and (3) of this request, although section 36(2)(c) is engaged, the public interest favours disclosure.
33. However, as regards part (2.3) of the request, which asked to know the interest rate for each loan taken out by the Council, the Commissioner considers that the public interest falls in favour of maintaining the exemption. He recognises (as did the Tribunal) that publication of a particular interest rate at the time of the request could give a competitor an unfair advantage in the borrowing and/or lending market.
34. There is also limited public interest in the disclosure of the granular detail of interest rates charged on each loan in the absence of a considerable amount of contextual detail, as it would be unlikely to shed light on whether any particular borrowing entered into by the Council was competent or prudent. Moreover, there is a strong public interest in protecting commercially sensitive information which, if released in an uncontrolled manner, may distort or unbalance financial markets and adversely impact on the commercial position of lenders and other third

parties. Having considered the risks associated with disclosing the interest rate information against the possible benefits of doing so, the Commissioner's decision is that, for part (2.3) of this request, the public interest favours maintaining the exemption at section 36(2)(c) of FOIA.

Section 43 – Commercial interests

35. In view of his decision that section 36 provides lawful grounds for withholding the interest rate information requested at part (2.3) of the request, that information is exempt from disclosure and has not been further considered under section 43.
36. 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).
37. 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).
38. 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).
39. 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.

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

40. The Council argued that its borrowing position would be adversely affected, in that it could expect to incur increased costs if the information was disclosed and it would hinder the Council in raising funds through the local authority market. It said disclosure would weaken the Council's ability to be able to negotiate competitively in the future. It also said the information was of commercial interest to competitors, who would be advantaged by knowing it, to the detriment of those with whom the Council deals.

41. 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, the Tribunal 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."

42. 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".

43. 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 already considered by 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.

44. As regards the information requested at part (3) of the request (the identities of former lenders, which was not previously considered by the Tribunal) disclosure would not reveal specific details as to why there was not a current lending relationship between the Council and the former

lenders. Lending arrangements may have been curtailed for reasons other than those speculated about by the complainant. The Commissioner therefore does not accept that any third parties' interests would, or would be likely to, be prejudiced by them being publicly identified as former lenders to the Council.

45. The Commissioner's decision is therefore that the exemption at section 43 of FOIA is not engaged in respect of parts (2), (2.1), (2.2), (2.4), (2.5) and (3) of this request.

Commissioner's decision

46. The Commissioner's decision is that the Council was not entitled to apply sections 36(2)(c), and 43 of FOIA to withhold the information at parts (2), (2.1), (2.2), (2.4), (2.5) and (3) 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

47. 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.
48. 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.
49. 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.
50. The Commissioner has made a note of this for monitoring purposes.

Other matters

Other requests for information submitted by the complainant

51. 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 Council⁵. 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).
52. 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.

⁵ Dealt with under reference IC-128396-J6Q7

Right of appeal

53. 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

54. 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.
55. 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
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