



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0242 and 0241

Decided without a hearing on: 12 November 2021

Before

**JUDGE SOPHIE BUCKLEY
MARION SAUNDERS**

Between

GARETH DAVIES

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

THURROCK COUNCIL

Second Respondent

MODE OF HEARING

The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.

**CONSENT OF PARTIES TO PROCEEDING IN THE ABSENCE OF ONE
MEMBER**

Schedule 4 para 15(6) Tribunal, Courts and Enforcement Act 2007 (TCEA)

All parties provided their consent for the matter to be decided in the absence of one of the members chosen to decide the matter.

DECISION

1. This decision applies to appeal number EA/2020/0241 and appeal number EA/2020/0242.
2. For the reasons set out below the appeals are allowed.
3. In decisions promulgated on 2 March 2021 ('the March decisions'), the tribunal determined that the Council was not entitled to rely on s 43 to withhold the information.
4. The tribunal substitutes the following decision notices:

SUBSTITUTE DECISION NOTICE -FS50894976 (EA/2020/0241)

Organisation: Thurrock Council
Complainant: Gareth Davies
Substitute Decision Notice - ref FS50894976

For the reasons set out below and in the decision promulgated on 2 March 2021 Thurrock Council ('the Council') were not entitled to rely on s 43 or s 36 of the Freedom of Information Act 2000 (FOIA) to withhold the requested information.

The Council is required to take the following step within 42 days of the date of promulgation of this decision:

Disclose the requested information to Mr. Davies.

SUBSTITUTE DECISION NOTICE - FS50909957 (EA/2020/0242)

Organisation: Thurrock Council
Complainant: Gareth Davies
Substitute Decision Notice - ref FS50909957

For the reasons set out below and in the decision promulgated on 2 March 2021 Thurrock Council ('the Council') were not entitled to rely on s 43 or s 36 of the Freedom of Information Act 2000 (FOIA) to withhold the requested information.

The Council is required to take the following step within 42 days of the date of promulgation of this decision:

Disclose the requested information to Mr. Davies.

REASONS

Introduction

1. This tribunal has heard two appeals together and this decision applies to both appeals.
2. EA/2020/0241 is an appeal against the Commissioner's decision notice FS50894976 of 14 July 2020 which held that Thurrock Council ('the Council') was entitled to rely on section 43 of the Freedom of Information Act 2000 (FOIA) to withhold the information. The Commissioner did not require the Council to take any steps.
3. EA/2020/0242 is an appeal against the Commissioner's decision notice FS50909957 of 14 July 2020 which held that Thurrock Council ('the Council') was entitled to rely on section 43 of the Freedom of Information Act 2000 (FOIA) to withhold the information. The Commissioner did not require the Council to take any steps.
4. In the March decisions the tribunal determined that the Council was not entitled to rely on s 43 to withhold the information. The Council was then joined as a party and submissions invited on the application of s 36. The application of s 36 is the subject of this decision.
5. Much of the background and reasoning is set out in the March decisions and this decision should be read together with the March decisions and their closed annexes.

Requests and Decision Notices.

6. The details of the request, response and decision notice are set out in the March decision.

Grounds of Appeal

7. The grounds of appeal are set out in the March decisions.

The Commissioner's response

8. The Commissioner's responses are set out in the March decisions.

Submissions of Mr. Davies

9. The submissions of Mr. Davies submitted prior to the March decisions are set out in the March decisions.

Submissions on s 36

10. We have been provided with the following additional submissions on s 36:
 - 10.1. Written submissions of the Council dated 26 April 2021
 - 10.2. Supplementary submissions from the Commissioner dated 8 June 2021
 - 10.3. Supplementary submissions from Mr. Davies dated 9 June 2021
 - 10.4. Final written submission of the Council dated 23 September 2021

Submissions of the Council dated 26 April 2021

11. In relation to the applicable law the Council refers to para 53 of the Commissioner's guidance that explains that prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose.
12. The Commissioner's guidance also explains at para 69 that if the qualified person has decided that disclosure would prejudice or inhibit this will carry a greater weight than if they said disclosure would be likely to prejudice or inhibit.
13. The Council also refers to the following observations of the first tier tribunal in **Guardian Newspapers Ltd and Brooke v Information Commissioner and BBC** (EA/2006/0011 and EA/2006/0013, 8 January 2007):

“In our judgment the right approach, consistent with the language and scheme of the Act is this: the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by s2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur.
14. As background the Council states that the key benefit of its investment strategy is that it allows the Council to generate a significant level of income, particularly in the light of current pressures on local authority finances.
15. In relation to EA/2021/0241 the Council relies on the reasonable opinion of Tim Hallam, Acting Head of Law and Assistant Director of Law and Governance and Monitoring Officer, who concluded that the s36(2)(b) and s36(2)(c) were engaged.

16. In relation to s 36(2)(b) Mr. Hallam's opinion noted that disclosure would be likely to set a precedent for the disclosure of other similar information and therefore would be likely to have an inhibiting effect in the future.
17. In relation to s 36(2)(c) Mr. Hallam's opinion was that the Council has been able to improve its financial position, including through investments, funded in part through borrowing, which has had a direct benefit for residents. Disclosure would hinder the Council's working relationship with other parties, in particular other local authorities, in relation to these matters. This would reduce the financial resources the Council has to spend and negatively impact the services the Council provides.
18. The Council's position is that if there is a presumption created by this appeal that local authorities must disclose the amounts/interest rates/terms of agreements on which they borrow or lend money, any deliberations about potential borrowing or investment will become much more restricted in order to avoid divulging information that later becomes disclosable. There will be a chilling effect and the market will ultimately become far more difficult to negotiate.
19. Mr. Hallam's opinion should not be disturbed by the tribunal unless it is plainly unreasonable.
20. The Council accepts that there is a legitimate public interest in disclosure but submits that it is trumped by the clear prejudice that would be likely to be caused to the Council and its ratepayers.
21. In relation to EA/2020/0242 the Council notes that Tim Hallam acknowledges the guidance that s 36(2)(c) should not be seen as covering reasons covered by other exemptions.
22. The Council's case on s 36(2)(c) is as follows:
 - 22.1. The Council's treasury management strategy relies on it being able to undertake commercial investment transactions which are by their nature sensitive and rely on the discretion of the parties.
 - 22.2. For the Council to adopt this approach it has to have a portfolio of agreements in which the details of each transaction when considered in its individual scope can be assessed and the merits may be seen in its individual context. However, in disclosing one individual transaction, the portfolio is undermined which is critical to the success of the Council's strategy.
 - 22.3. The public interest in disclosure does not outweigh the fact that there would be prejudice to the Council's strategy of using a layering of different agreements to meet overall need and, because of the

Council's approach to funding front-line services, the consequent prejudice to the Council's duties in respect of service delivery to the public.

23. The Council submits that this is the type of adverse effect on the public authority's ability to offer an effective public service or to meet its wider objective or purpose envisaged in the Commissioner's guidance.
24. The Council relies on the other public interest factors against disclosure outlined in its submissions on s 43(2), namely that the Council is not borrowing in advance of its needs but to fund its budget deficit. It has a present need to deliver services which cannot be met without increasing its income, and which it has been meeting by increasing its income through a prudent investment strategy. The Council is working properly within the Guidance and its commercial investments are regulated by the FCA. Its commercial practice does not disclose breaches of the Prudential Code or Guidance and any public interest in disclosure on such a basis is therefore reduced.
25. The Council submits that the grounds for not disclosing the information are stronger and the grounds in favour of disclosure less robust than those considered by the tribunal on the papers in the light of the fact that the Council follows and complies with relevant statutory guidance and its accounts are regularly audited by external auditors who have not identified any issues for concern.

Supplementary submissions from the Commissioner dated 8 June 2021

26. The Commissioner maintains that the appeal should be dismissed on the basis that the s 36(2) exemption is engaged and the public interest in disclosing the withheld material is outweighed by the public interest in maintaining the exemption.
27. The Commissioner takes the view that the qualified person's view is an objectively reasonable one.
28. The Commissioner was persuaded by the argument that disclosure of withheld information may have something of an inhibiting effect on the Council and set an unwelcome precedent for others, if the relevant parties felt that deliberations and discussions of investment and borrowing strategies could be yet further scrutinised and this could result in such discussions being less candid and open the Council up to more investment risk. Accordingly the Commissioner took the view that s 36(2)(b) was engaged.
29. The Commissioner concluded that the evidence showed a clear link between disclosure and the prejudice to the effective conduct of public affairs to the

extent that disclosure would materially impact on the Council's ability to deliver its public services due to a lack of funding. This is evidenced by emails expressing reluctance of third parties to continue with investments and submissions from the Council that this trend of losing investors has continued.

30. The witness statement of Tim Hallam and the audit report, describing the Council's dependence on delivery of a material commercial investment as a challenge to their commercial and financial management clearly explains a causal link between the requested information and prejudice to the Council's effective conduct of public affairs in its ability to set and maintain its budget. The Commissioner accepts that s 36(2)(c) is engaged.
31. The Commissioner noted that there was significant public interest in openness and transparency generally, particularly in regard to matters of investment and spending. However, the Commissioner also noted the Council's stance that its investment strategy to reduce its budget deficit has been conducted in compliance with all of the relevant codes and guidance. Furthermore the Commissioner noted that the Council published appropriate reports which included annual accounts and indicators of the Council's total risk exposure from investment decisions, which reduced markedly the public interest in transparency. On balance the Commissioner concluded that s 36(2)(b) and (c) were engaged and the public interest in disclosure was outweighed by the public interest in maintaining the exemption.

Supplementary submissions from Mr. Davies dated 9 June 2021

32. The Council's submissions and Tim Hallam's witness statement emphasise rather than detract from the very strong public interest in transparency found by the tribunal. More information has come to light which places further weight on the need for transparency.
33. The Council's submissions and witness statement do not indicate that the information in the public domain is any closer to the level of transparency that is called for.
34. The Council has, since these proceedings began, had to borrow £425m from the Public Works Loan Board ('PWLB') because it could not finance this in the Local Authority market. The national tax payer assumes the risk and therefore had a strong interest in being able to scrutinise how their money is being spent by the Council. The Treasury has recently revised the lending terms in response to concerns raised by the Public Accounts Committee and the National Audit Office about substantial PWLB borrowing in order to make commercial investments for yield. The Government was 'clear that this is not an appropriate use of PWLB loans'.

35. The audit at TH1 underlines the ‘notable’ ‘challenges’ arising from the ‘dependence’ upon commercial investment income, and the resulting ‘significant risk in respect of sustainable resource deployment’. This significantly bolsters the two aspects of public interest identified by the Tribunal (scrutiny of the strategy and plausible specific concerns), while adding little if anything to the public interest in withholding the information already considered by the tribunal.
36. Facts and matters that did not exist at the date of refusal can be relevant in so far as they shed light on the position at the time. The concerns in relation to companies through which the Council invests in renewable energy have grown, which emphasises the need for a detailed, granular scrutiny of the prudence and propriety of the investments which were made.

Final written submissions of the Council dated 23 September 2021

37. In his submissions the Appellant does not dispute that s 36 is engaged, nor does he seek to challenge the reasonableness of the opinion of the qualified person.
38. Disclosure will have an adverse effect on the Council’s ability to offer an effective public service or to meet its wider objectives or purpose, because it would face an increase in interest rates on loans, a significant risk of current investments being redeemed early and an inability to make similar investments in the future:
 - 38.1. When refinancing its debts fewer local authorities will be prepared to lend to the Council as a result of concerns over potential disclosures of confidential/commercially sensitive information.
 - 38.2. The Council would be unable to negotiate competitively as local authority lenders would be likely to align their interest rates to the highest amount.
 - 38.3. The interest rates charged by the PWLB are higher than rates charged by other local authorities.
 - 38.4. It is likely that bond issuers would redeem bonds early to avoid damaging their own financial interests.
 - 38.5. The Council’s ability to make future investments is likely to be significantly impaired due to the reluctance of bond issuers to publicly divulge particulars of their agreements.
39. This would have an adverse effect on the Council’s ability to set a balanced budget, because delivery of its commercial investment strategy is key to the achievement of the Medium Term Financial Plan.
40. The Council has already provided a sufficient level of disclosure to allow an informed member of the public to understand the Council’s exposure to risk.

The prejudice to the Council's ability to effectively conduct public affairs significantly outweighs the public interest in disclosure.

The Council's response to specific issues raised by Mr. Davies

Borrowing in advance of need

41. The Council has not been borrowing in advance of its needs. Delivery of the Council's commercial investment strategy is key to the achievement of the Medium Term Financial Plan. This is not a breach of statutory guidance which explains at para 44 that:

Where a local authority is or plans to become dependent on profit generating investment activity to achieve a balanced revenue budget, the Strategy should detail the extent to which funding expenditure to meet the service delivery objectives and/or place making role of that local authority is dependent on achieving the expected net profit.

Transparency

42. The evidence now before the tribunal shows that there was no shortage of accessible public information about the Council's investments. The appellant's own documents include the Council's accounts for 2018/19, which explicitly refer to the investments and include a detailed risk analysis of the investments; a report of the Cabinet Member for Finance to full Council dated 28 September 2016; and a Treasury Management Report dated 14 December 2016. These are just examples of the kind of material the Council has made publicly available.
43. The Council has to publish its Treasury Management Strategy annually. The purpose is to comply with the CIPFA's Treasury Management in the Public Services: Code of Practice 2017 Edition (the CIPFA Code) and the Prudential Code for Capital Finance in Local Authorities (the Prudential Code). The Capital Strategy Report for 2021/2022 provides information in respect of various prudential indicators, with the purpose of complying with the statutory guidance.

Governance

44. The evidence of Mr. Hallam and Mr. Clark shows that there has been significant oversight of the Council's borrowing and investment activities by Council members. The overall strategy has been approved annually by full Council. There has been oversight by the Council Cabinet, the Corporate Overview and Scrutiny Committee, Standards and Audit Committee. Council Members were frequently briefed by officers and able to exercise control over the activities.

Inherent risk of the strategy

45. Mr. Davies statements as to the fragility of the borrowing and investment activities are mere assertions contradicted by the Council's evidence.

New facts and matters

46. The Council's strategy remains viable and successful. The new facts and matters do not shed any light on the Council's decision to maintain the exemption.

Evidence

47. We have taken account of any relevant documents provided to us before the March decision. We read open and closed bundles, and further additional documents, which we have taken account of where relevant. We have taken account of Mr. Davies' document entitled 'Explanation of supplemental documents'. We took account of a small number of additional closed documents which had been omitted from the bundle and were provided by the Commissioner on the day of the hearing.
48. We have read and taken account of where relevant the additional closed and open evidence on the application of s 36 provided since the March decision in section E of the open bundle and section B of the closed bundle. We have also read and taken account of where relevant some additional documents submitted separately to the bundle.
49. We have read and taken account of witness statements and exhibits on behalf of the Council from Tim Hallam, Deputy Head of Legal and Deputy Monitoring Officer, Richard Burton, Solicitor, and Sean Clark, the Council's Corporate Director of Resources and Place Delivery.

Witness statement of Tim Hallam

50. In his statement Tim Hallam explains the basis for his opinion that s 36(2)(b) and (c) was engaged.
51. In relation to s 36(2)(b) he explains that he considered that any requirement for local authorities to disclose detailed particulars of its borrowing and investments, beyond any requirement set by the statutory guidance would result in any deliberations about potential borrowing or investment being much more restricted, so as to avoid divulging information that would later become disclosable. Further a requirement to disclose information may set a precedent in similar cases which would have an inhibiting effect for other local authorities.

52. In relation to s 36(2)(c) Tim Hallam explains that he took into account the fact that the prejudice envisaged must be different to that covered by any other exemption and highlighted facts which he states were not captured by the s 43 exemption:
- 52.1. The Council's Treasury Management Strategy authorising the Council's borrowing and investment activities had been approved by full Council.
 - 52.2. The Council had been publishing Capital Strategy Reports on an annual basis with the purpose of complying with the Statutory Guidance on Local Government Investments which requires local authorities to disclose information using prudential indicators so that the general public understand a local authorities' total risk exposure.
 - 52.3. The Council had been reporting on its borrowing and investments in its annual account which had been approved by external auditors.
 - 52.4. The investment strategy had been key to the Council achieving its medium term financial strategy.
53. Bearing in mind the prejudice to the Council's commercial interests that would be likely to arise from disclosure of the information (essentially an increase in interest rates on loans, and current and/or future investments being put in jeopardy), Mr Hallam considered that the effect of the disclosure would be a risk to the Council's medium term financial strategy.
54. Given the auditor's report which stated (at TH1 page 52) that 'The financial and commercial management challenges faced by the Council are notable, in particular the dependence upon delivery of material commercial investment income in 2018/19 and 2019/20', Mr. Hallam concluded that disclosure of the information would 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. In his opinion, this was a real and significant prejudice on the Council's ability to conduct public affairs.
55. Mr. Hallam also gives his opinion on the public interest balance at paras 13 and 14 of his witness statement. He considered that the concerns around transparency and public scrutiny were met by the information that had already been published in the annual accounts, Capital Strategy Reports and auditor's reports which was sufficient to enable the public to understand the total risk exposure. Disclosure of detailed particulars was not necessary. Weighing the substantial prejudice to the Council's medium term financial strategy against the benefit to the public in being able to gain a slightly better understanding of the Council's risk exposure, he concluded that the public interest was in favour of applying the exemption.

Witness statement from Sean Clark

56. A formal Investment Strategy was first agreed by the Council in October 2017. The strategy was supported by the Council in February 2018, February 2019, February 2020 and February 2021. The external auditors have raised no issues with the Council's investments or the strategy.
57. The Council's investment strategy has gone some way to alleviating the financial pressures that it faces.
58. Since the sequence of articles and challenges to the Council's approach from Mr. Davies, the Council has found it increasingly difficult to secure borrowing from the inter-authority market. The Council has had to look at alternative borrowing options including the PWLB.
59. In undertaking investments the Council has carried out due diligence in using professional valuation, accountancy, legal and treasury advisors. Council members have retained oversight and ultimate decision making responsibility and there has been oversight by the Corporate Overview and Scrutiny Committee, Standards and Audit Committee and Cabinet.
60. Many documents on the strategy are available on the Council's website.
61. In relation to Rockfire investments, the comments of the judge **in Toucan Energy Holdings Limited v Wirsol Energy Co Limited** [2021] EWHC 895 (Comm) have no relevance to the Council's underlying investments. The investments have performed well, which has enabled the Council to deliver services beyond the statutory minimum. Mr Clark sets out key facts relating to the investments.
62. In relation to PWE holdings Mr. Davies' submissions are broadly correct. This investment accounts for about 2 % of the portfolio. With any investment there is a degree of risk. The business of PWE was significantly affected by Covid 19. The Council is currently working with its advisors to reassess and proactively manage its investment in the current economic circumstances, as part of its prudent management of its portfolio. The investment has now returned approximately 50% of the council's initial investment to date. The key objective of the council is to protect its remaining exposure to the fullest extent possible.

Legal framework

S 36 – prejudice to effective conduct of public affairs

63. Section 36(2)(b) and (c) provide:

Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act:

- ...
- (b) would, or would be likely to, inhibit –
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

64. A 'qualified person' for the purposes of this appeal is defined in s 36(5) (o) as any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.
65. S 36 is a qualified exemption, so that the public interest test has to be applied.

The Task of the Tribunal

66. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

67. The issues we have to determine are as follows:
1. Has a 'qualified person' given an opinion that s 36(2)(b) and (c) are engaged?
 2. Was that opinion objectively reasonable?
 3. If so, does the public interest favour maintaining the exemption?

Discussion and conclusions

Has a qualified person given an opinion that s 36(2)(b) and (c) are engaged?

68. Tim Hallam has confirmed that he is a qualified person under s 36(5)(o) and the tribunal accepts this.
69. His opinion is contained in an email in the bundle at p D530 and is supplemented in his witness statement. We accept that he gives his opinion that s 36(2)(b) and (c) are engaged.

Was that opinion objectively reasonable?

S 36(2)(b)

70. Tim Hallam's opinion was that s 36(2)(b) was engaged on the basis that a requirement for local authorities to disclose detailed particulars of its

borrowing and investments, beyond any requirement set by the statutory guidance, would result in any deliberations about potential borrowing or investment being much more restricted, so as to avoid divulging information that would later become disclosable. Further a requirement to disclose information may set a precedent in similar cases which would have an inhibiting effect for other local authorities.

71. This is the basis on which Mr. Hallam concluded that disclosure of the information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.¹
72. We bear in mind that that Mr. Hallam has to make a judgement call about the effects of a hypothetical, future event. The tribunal has had difficulty in understanding how Mr Hallam reached the conclusion that the free and frank exchange of views for the purposes of deliberation would be likely to inhibited by the release of the requested information.
73. The requested information is limited to facts and figures about the investments or loans. These matters do not appear to have been recorded because they have been divulged in deliberations. They consist of information that is likely to be held, and therefore potentially disclosable, by the Council in relation to future investments in any event, however inhibited the free and frank exchange of views might be during deliberations about those investments.
74. We bear in mind that our role is restricted to considering whether the qualified person's opinion is reasonable rather than whether or not we agree with it. We also note that there are no submissions from Mr. Davies on this point. However in the absence of any explanation for why Mr. Hallam might have taken the view that there was a causative link between the disclosure of information *of this type* and any effect on the free and frank exchange of views for the purposes of deliberation, we do not think that his opinion is objectively reasonable. Accordingly we find that s 36(2)(b) is not engaged. The Council was not entitled to rely on s 36(2)(b) to withhold the information.

S 36(2)(c)

75. We accepted in our previous decision that disclosure may lead to a reduction in the money available to the Council to spend. Mr. Hallam's opinion is that this would be likely to cause prejudice to the effective conduct of public affairs because it would be detrimental to the Council's ability to set a balanced budget and, consequently, the Council's ability to offer an effective public service. This opinion is, in our view, not an unreasonable one. We accept that s 36(2)(c) is engaged.

¹ Although the witness statement uses 'would' the Council's submissions and original opinion given on 4 February 2020 use 'would be likely to'.

If so, does the public interest favour maintaining the exemption?

76. In assessing the public interest balance we have to reach our own view on whether the protected interests would or would be likely to be inhibited or prejudiced and the severity, extent or frequency of such inhibition and prejudice. In doing so we give respect and weight to the opinion of Tim Hallam as an important piece of evidence.

S 36(2)(b)

77. If we had determined that s 36(2)(b) was engaged we would have concluded that there was unlikely to be any significant 'chilling effect' on the free and frank exchange of views during deliberations about future investments. Mr. Hallam has not explained why the disclosure of factual particulars about investments and loans would lead officers or employees to conclude that other information divulged during any free and frank exchange of views would in the future be disclosable. We would not expect any employees or officers of the Council to be likely to neglect their duty to give frank advice or views concerning the investment of public money on this basis.
78. On this basis we would have concluded that there was not, in this case, a significant public interest in maintaining the s 36(2)(b) exemption. We would have found that it was outweighed by the strong public interest in disclosure set out below. We would have concluded that the Council was not entitled to rely on s 36(2)(b) to withhold the information.

S 36(2)(c)

EA/2020/0241

79. In the March decision we accepted that there was, as a matter of common sense, a causal relationship between disclosure of this information in relation to previous loans and the claimed prejudice to the Council's ability to negotiate as favourable interest rates in the future. Further, as set out in the closed annex to the March decision, we accepted there was a causal relationship between disclosure of commercially sensitive information being released and other lenders/borrowed not wanting to work with the Council. We accepted that these has a causal relationship with the amount of money the Council had to spend on its services.
80. Other than the concerns about disclosure of commercially sensitive information, we found that the Council had not established a causative link between the disclosure of this information and a negative impact on the Council's reputation due to 'loss of investor/lender confidence'.

81. Having considered the information provided by the Council we accepted that there is a real and significant risk of the identified prejudice occurring as a result of the disclosure.
82. However given the fairly limited range of interest rates, particularly when comparing loans of a similar amount and over a similar period, we concluded that any reduction in finances due to the effect on the Council's competitive ability to negotiate a different rate would be likely to have a fairly marginal impact on the Council's ability to provide services.
83. Further, in relation to other lenders/borrowers refusing to work with the Council we concluded, for the reasons set out in the closed annex that this was also likely to have a fairly marginal impact on the Council's ability to provide services.

EA/2020/0242

84. In the March decision we accepted that, as a matter of common sense, there was a causal relationship between the disclosure of commercially sensitive information about, for example, interest rates and gross and net returns, and the future willingness of other companies to work with the Council. We concluded that there was accordingly a causal relationship between disclosure and a reduction in spend.
85. We also accepted that there was a causative link between disclosure of this information and a negative impact on the Council's working relationship with lenders and a negative impact on the Council's reputation due to a loss of investor confidence in the Council for the reasons set out in the closed annex to the March decision.
86. For the reasons set out in the closed annex to the March decision, we took the view that the disclosure of the detailed information requested would lead to a real and significant risk that additional local authorities would refuse to work with the Council, who would otherwise have continued to do so. Further we took the view that some of this would be likely to be as a result of a loss of investor confidence.
87. In terms of the weight this carried in the public interest balance, the tribunal found that although this might lead to a reduction in the money available to the Council to spend, its weight was limited by the fact that any reputational damage or loss of investor confidence that might arise from the local authorities' awareness of how their money is being used, is not, in the tribunal's opinion unwarranted.
88. In terms of the risk of a detrimental effect on future investment opportunities, in the absence of any evidence on this point, it was difficult for the tribunal to

assess the chances of companies refusing to work with the Council in the future. In the tribunal's view this risk was likely to be limited. We noted that there was a large incentive for companies to obtain investment from local authorities, particularly one willing to invest significant sums like this particular Council. Further, companies should already have been aware of the requirements of FOIA and the risk of the disclosure in relation to investments involving large sums of public money. However we acknowledged that there may be companies who do not wish, for example, their interest rates and returns to be made public.

89. Taking a common sense approach we accepted that there was real and significant risk that a small number of investment opportunities would no longer be available to the Council. In terms of any effect on the Council's spend, we found that this would depend on the availability of alternative investments and is very unclear. Given the lack of evidence on this point and the speculative nature of our findings, we concluded that its weight in the public interest balance was fairly limited.

EA/2020/0241 and EA/2020/0242

90. We have considered the evidence and submissions provided by the Council since the March decision. The Council submits that if the information was disclosed:
- 90.1. fewer local authorities will be prepared to lend to the Council as a result of concerns over potential disclosures of confidential/commercially sensitive information.
 - 90.2. The Council would be unable to negotiate competitively as local authority lenders would be likely to align their interest rates to the highest amount.
 - 90.3. The interest rates charged by the PWLB are higher than rates charged by other local authorities.
 - 90.4. It is likely that bond issuers would redeem bonds early to avoid damaging their own financial interests.
 - 90.5. The Council's ability to make future investments is likely to be significantly impaired due to the reluctance of bond issuers to publicly divulge particulars of their agreements.
91. The Council has provided a further email which contains evidence from the Council's broker reporting that a couple of authorities, who otherwise would have been prepared to lend money to the Council, have decided not to do so

until the Tribunal makes a final decision in this case and that those authorities have said that they would be unlikely to lend to the council in the future should the Council be unsuccessful. Further, Mr. Clark gives evidence that 'since the sequence of articles and challenges to the Council's approach from the Appellant, the Council has found it increasingly difficult to secure borrowing from the inter authority market...other authorities would rather deposit funds with the Debt Management Office, often at cost, than place themselves at risk of being involved with media requests'.

92. This does not alter our conclusions set out above and, in particular in the closed annex to the March decisions, where we considered the limited evidence linking the local authorities' reluctance to lend with the disclosure of this specific information. We reach the same conclusion, namely that there was a real and significant risk that at least a small number of local authorities would refuse to work with the Council as a result of disclosure of the information.
93. In terms of the financial consequences of this, we have considered the evidence in the closed annex which details the differentials in the interest rates available from the PWLB and those available on the inter-authority lending market. This resulted in an estimated net additional interest cost to the Council of £2.61m in the year 2020/2021. Given that this is a loss that has arisen without the disclosure of the requested information, and given the limited direct evidence as to the link between local authorities' refusal to lend and the disclosure of the requested information, the tribunal does not accept that this figure illustrates the likely impact of the disclosure of this information. We maintain our conclusion that it would have a fairly marginal impact on the Council's ability to provided services.
94. In relation to the effect on future investments, none of the new evidence provided causes us to alter our conclusion that there was real and significant risk that a small number of investment opportunities would no longer be available to the Council. In terms of any effect on the Council's spend, we found that this would depend on the availability of alternative investments and is very unclear. Given the lack of evidence on this point and the speculative nature of our findings, we conclude that its weight in the public interest balance is fairly limited.
95. There is no evidence before us to support the assertion that it is likely that bond issuers would redeem bonds early to avoid damaging their own financial interests. Neither Mr. Clark nor Mr. Hallam have identified this as a risk. We do not know whether there are any risks to a bond issuer in redeeming bonds early, for example, of failing to obtain a reinvestment or of failing to negotiate a more favourable agreement, or even as favourable an agreement. In the absence of any evidence on whether there is a real rather

than a fanciful risk of bond issuers redeeming bonds early, we do not place any weight on this in the public interest balance.

96. In terms of the risk of a detrimental effect on future investment opportunities, we remain of the view that there was a real and significant risk that a small number of investment opportunities would no longer be available to the Council. In terms of any effect on the Council's spend, we find this would depend on the availability of alternative investments and is very unclear. Given the lack of evidence on this point and the speculative nature of our findings, we conclude that its weight in the public interest balance is fairly limited.
97. We note from the minutes of the Corporate Overview and Scrutiny Committee on 21 January 2021 that the Council had, by that stage, paused its investment strategy, 'due to recent publicity surrounding investments at Thurrock, as well as a government change in policy... previously the government had encouraged councils to be entrepreneurial and undertake investments, but recent policy had stated that local authorities should not invest. He added that the Public Works Loans Board (PWLB) had also introduced a new policy in November 2020 of not lending to Councils who undertook investments, and the majority of the Council's borrowing came from the PWLB". Although we must assess the public interest at the relevant date - here the date of the internal review - our conclusion that the disclosure of the specific information would have had a fairly marginal impact on the Council's ability to provided services has been borne out by later events.
98. In reaching the above conclusions, we have given respect and weight to the opinion of Tim Hallam as an important piece of evidence, but even taking that opinion into account we consider that the weight of the matters set out above in the public interest balance is limited for the reasons set out above.
99. Our conclusions on the public interest in disclosure in the March decision were that there was significant public interest in transparency in relation to the actions of Councils in borrowing to invest for the purpose of making profit. This is because of the context of the statutory guidance, and the concerns about these practices and about transparency raised, for example, by the Public Accounts Committee. Further we took account of the Government's view on the need for transparency and openness set out in paragraph 12 of the informal commentary on the statutory guidance.
100. The Council argues that it is not borrowing in advance of need. The Tribunal does not need to determine whether or not the Council is in breach of the Code. However, we note that the view of Rob Whiteman, CEO of CIPFA, is

different to the Council's view.² The Tribunal remains of the view there is a plausible suggestion that the Council is not acting in accordance with the statutory guidance by borrowing from other public authorities to fund investments for the purpose of making a profit and that there is a strong public interest in transparency in their actions for this reason. Further we remain of the view that there are plausible concerns in relation to one of the companies through which the Council invests in renewable energy.

101. We concluded in the March decision that the information on transparency by the Council before us at the previous hearing went some way towards satisfying the requirement for public or other scrutiny of the Council's financial investments, and the requirement for proper governance.
102. We accept that the Council has provided some further evidence of scrutiny and transparency in relation to its financial strategy, albeit that a number of the meetings relied on postdate the internal review. This decreases the public interest in disclosure to some extent. However, we note that when the Investment Strategy was agreed by the Council in February 2020 a specific request was made to further improve democratic oversight of the investment process. Further, we note that in November 2020 the Council was in the process, of setting up an Investment Committee, but it had not yet been set up at the relevant time.
103. Even taking the additional evidence into account, we accept that Mr. Davies has raised plausible concerns about the level of internal governance and scrutiny within the Council. This concern seems to be echoed within the Council, given the request for improvement of democratic oversight.
104. We maintain our view that we have not seen evidence to suggest there is sufficient transparency to allow an informed member of the public to understand the exposure to risk that the Council has as a result of borrowing and investment decisions.
105. We remain of the view that, given the large amounts of public money involved, and these plausible concerns, there is a very strong public interest in allowing public scrutiny of the Council's borrowing and investments to allow an informed member of the public to understand the exposure to risk that the Council has as a result of borrowing and investment decisions.
106. Taking into account of all of the above, we conclude that the strong public interest in disclosure outweighs the public interest in maintaining the exemption.

² <https://committees.parliament.uk/oralevidence/1688/html/> at question 6: 'The little bit of interpretation that started to go on is that people said, "If we are going to use this income to subsidise services, surely it is for services. In other words, we are borrowing this money and we are going to use the income from commercial purposes to subsidise services. Therefore, it is not in advance of need". That is an interpretation that I think is against the code.'

107. For the reasons set out above the appeal is allowed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 7 December 2021

Promulgation Date: 8 December 2021