

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 May 2023

**Public Authority:** Warrington Borough Council  
**Address:** East Annexe  
Town Hall  
Sankey Street  
Warrington  
WA1 1UH

#### **Decision (including any steps ordered)**

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1. The complainant requested information about a loan that Warrington Borough Council (the Council) had agreed with a third party. The Council withheld the information requested under sections 41 (information provided in confidence), 42 (legal professional privilege) and 43 (commercial interests) of the FOIA and regulation 12(5)(e) (commercial or industrial information) of the EIR. At the time of its internal review the Council confirmed that the request should have been handled entirely under the EIR. It provided some information but stated that the remaining information was exempt under regulations 12(4)(e) (internal communications), 12(5)(b) (legal professional privilege) and 12(5)(e).
2. The Commissioner's decision is that regulation 12(5)(b) is engaged and the public interest favours maintaining the exception, regulation 12(4)(e) is engaged and the public interest favours disclosure, and regulation 12(5)(e) is not engaged. The Commissioner also finds that the Council breached regulations 5(2), 14(2) and 11(4) in its handling of the request.

3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information with the exception of paragraph 7 of the Cabinet Report dated 12 October 2022, ensuring that any personal data is redacted subject to the terms of the Data Protection Act 2018.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### **Request and response**

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5. On 1 September 2021 the complainant wrote to the Council and requested information in the following terms:

“In October 2020, Warrington Borough Council’s cabinet approved a £202m loan facility to Icon 3 Holdco Ltd, taking security over several properties as part of the loan.

Please provide:

- 1) Any and all information regarding the discussion about extending the loan at the 12 October 2020 cabinet meeting, including but not limited to information on;
  - a. The council’s understanding of the financial risk it was taking on;
  - b. What the loan money would be used for;
  - c. The terms that were set;
  - d. Any statistical analysis that supported the decision;
- 2) Any and all information on the terms of the loan facility that falls under the EIR given that the deal relates to the development and construction of buildings and therefore the environment;
- 3) Any and all information about non-financial benefits for the council, such as securing direct investment or creating employment under the loan deal”.

6. The Council responded on 24 November 2021. It stated that the information requested was exempt under sections 41, 42 and 43 of the FOIA and regulation 12(5)(e) of the EIR.
7. Following an internal review on 21 November 2022 the Council stated that the request should have been handled entirely under the EIR. It provided a redacted copy of the Cabinet report and appendix 3 – the Council's risk register, and stated that the remaining information held relevant to the request was exempt under regulations 12(4)(e), 12(5)(b) and 12(5)(e).

### **Scope of the case**

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8. The complainant contacted the Commissioner on 16 December 2022 to complain about the way their request for information had been handled.
9. The scope of the Commissioner's investigation into this complaint is to consider whether the Council was correct to withhold the information requested.

### **Reasons for decision**

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#### **Is the requested information environmental?**

10. Firstly the Commissioner has considered whether the information requested is environmental.
11. In this case the requested information relates to a loan that the Council agreed with a third party for the purposes of property development. In keeping with regulation 2(1)(c), the Commissioner considers, therefore, that the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of *Kirkaldie v IC and Thanet District Council* (EA/2006/001) ("Kirkaldie").
12. In light of the above the Commissioner has concluded that the request falls to be considered under the EIR.

#### **Withheld information**

13. The withheld information in this case and the exceptions applied to the documents are set out below:

Cabinet Report  
Paragraph 7 of the report – regulations 12(4)(e) and 12(5)(b)

All other redactions – regulations 12(4)(e) and 12(5)(e)

Appendix 1 – CBRE Lending Proposal Document - regulation 12(5)(e)

Appendix 2 – Term sheet for investment facility – regulation 12(5)(e)

8 Loan documents – all withheld under regulation 12(5)(e)

### **Regulation 12(5)(b) – legal professional privilege**

14. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
15. In this case, the Council has withheld paragraph 7 of the Cabinet Report which comprises of legal advice from its legal advisors regarding matters relating to the loan in question. The Council considers the withheld information to be covered by legal professional privilege (LPP), specifically 'advice privilege'.
16. The Commissioner has viewed the withheld information and is satisfied that it constitutes confidential communications between a client and a professional legal advisor made for the dominant purpose of providing legal advice. He therefore considers the information to be covered by LPP on the basis of advice privilege. The Commissioner is aware of no evidence suggesting that this privilege has been waived
17. As the withheld information is subject to LPP and relates to a live matter as the loan is still in place, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

### **Public interest in favour of disclosure**

18. The Council acknowledges the public interest in disclosure of information where it assists public understanding of decision making. The Council also confirmed that it took into account the presumption in favour of disclosure provided by regulation 12(2) of the EIR.
19. The Council accepts that there is a general public interest in respect of openness, transparency and accountability, particularly where public funds are involved, as in this case.

20. The Council also considers there is a public interest in “the management of public funds and assets with regards to the Environmental Information Regulations particularly in relation to an individual’s right to know and a strong public campaign regarding the Council’s spending lending and debt”.
21. The complainant made a number of arguments in favour of disclosure. They consider that the redacted version of the report raises serious questions about the process the Council followed to approve the loan. Specifically, the redacted report refers repeatedly to the loan facility being provided to the Hut Group itself when in fact the loan was provided to a number of separate entities under the control of one individual. This issue has been the subject of media interest and in response to concerns raised the Council provided the following comment:

“We can confirm that Cabinet was clearly told the loan was to entities controlled by [name redacted]. This is clearly evidenced in the due diligence report which was appended to the report in several clear sections. There is a separate Know Your Client (KYC) section in the report that covers this in detail. It was also evidenced in the risk management workshop before the report was issued.”
22. In addition, the complainant alleges that the redacted report includes a number of factual errors such as the claim that, at the time the report was written, the Hut Group had an investment-grade credit rating that was in fact higher than its actual rating.
23. The complainant also pointed out that the Council has been subject to significant scrutiny concerning its financial affairs and “the level of prudence it has applied to its investment decisions in recent years”. They stated that the loan facility is by far the largest loan which the Council has agreed with any party. It is more than double the size of housing association loans and ten times the size of other commercial loans, as listed in the report.

### **Public interest in favour of maintaining the exception**

24. In terms of the public interest in maintaining the exception at regulation 12(5)(b), the Council referred to the strong public interest in public authorities not being discouraged from obtaining legal advice in order to ensure that decision making is legally sound. It considers that disclosure would have an adverse effect on the extent to which it seeks legal advice in the future, which in turn will have a negative impact on the quality of its decision making. This would not be in the public interest.
25. The Council referred to the strong public interest in maintaining the principle behind LPP in safeguarding the openness of communications

between a client and his or her lawyer to ensure access to free, frank and candid legal advice. Whilst the Council acknowledges that regulation 12(5)(b) is not an absolute exception, it does not consider that any exceptional circumstances exist in this case for the principles behind LPP to be overridden.

26. The Council explained that the loan facility is still live and there is ongoing scrutiny of the Council's loan portfolio. As such, the legal advice is still relevant and still live. Even if the matter was not live, the Council considers that the strong public interest in maintaining LPP would still apply as there needs to be a certain degree of certainty that lawyers are able to provide full and frank advice without a fear that the advice would be disclosed in the future, and subsequently damage their client's position.
27. The Council referred to the strong public interest in maintaining the principle behind LPP in safeguarding the openness of communications between a client and his or her lawyer to ensure access to full and frank legal advice. Full and frank advice ensures that the Council is able to make fully informed decisions.

### **Balance of the public interest test**

28. In balancing the opposing public interest factors in this case, the Commissioner considers that it is necessary to take into account the in-built public interest in the importance of maintaining the principle behind LPP. LPP is a fundamental principle of justice, and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
29. The Commissioner accepts that there will always be a public interest in transparency, accountability and in members of the public having access to information to enable them to understand more clearly why particular decisions have been made and certain processes followed.
30. Whilst the Commissioner notes that the complainant has raised concerns about the manner in which the Council approved the loan in question, he does not consider that, in this case, there are sufficient or compelling enough arguments in favour of disclosure which would override the inbuilt public interest in information remaining protected by LPP.
31. The Commissioner's decision is, therefore, that the balance of the public interests favours the exception being maintained. This means that the Council was not obliged to disclose the requested information.

32. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions. As stated above, in this case, the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in Regulation 12(2), is that the exception provided by Regulation 12(5)(b) was applied correctly.

### **Regulation 12(4)(e) – internal communications**

33. Regulation 12(4)(e) states that information is exempt from disclosure if it involves 'the disclosure of internal communications'. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.
34. The Council has withheld parts of a Cabinet report under regulation 12(4)(e). The Commissioner has already determined that paragraph 7 of the report is exempt under regulation 12(5)(b). As such, his consideration of regulation 12(4)(e) is limited to the remaining information which has been redacted from the report.
35. The Commissioner accepts that the Cabinet report is an internal communication is therefore satisfied that regulation 12(4)(e) is engaged and he has gone on to consider the public interest test.

### **Public interest in favour of disclosure**

36. The Council accepts that disclosure would promote "better government through transparency, accountability, public debate, better understanding of decisions and informed participation and understanding of democratic processes". The Council also acknowledges the public interest in this case as it involves a significant amount of public money.
37. The complainant made a number of arguments in favour of disclosure. These are set out in paragraphs 21 to 23 above.

### **Public interest in favour of maintaining the exception**

38. In favour of maintaining the exception, the Council stated that the loan facility continues to be in place in accordance with the relevant terms and conditions. As such, the Council considers that the matter is still live and a safe space is required to allow it to "review, consider and make effective decisions and debate issues away from undue external scrutiny".

39. The Council is of the view that disclosure would have a chilling effect on “the free and frank exchange of views in respect of this and other investment and regeneration matters now and in the future. It considers that it is plausible that the frankness of ongoing discussions would be adversely affected leading to less robust decisions”.

### **Balance of the public interest test**

40. The Commissioner’s guidance on this exception<sup>1</sup> explains that although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision-making processes. This reflects the underlying rationale for the exception being that it protects a public authority’s need for a ‘private thinking space’
41. The Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live. Whilst the Commissioner accepts that the Council is continuing to monitor and review the loan in question, he considers that the decision to agree the loan had already been made at the time of the request.
42. The Commissioner notes that the remaining information which the Council has redacted from the report comprises details regarding the terms of the loan (periods and financial amounts/percentages), high level information regarding the proposed developments (names, numbers of assets, financial and lease term information and the size of the asset (in square feet)), the number of other offers the borrower had received from other organisations and proposed spend on the assets during the loan period. In the Commissioner’s opinion this information does not appear to overly sensitive in nature.
43. Based on the fact that the loan had already been made at the time of the request and the content of the remaining withheld information the Commissioner is unable to understand exactly how disclosure of this specific information would have any impact on the safe space the Council states it requires in order to monitor and review the loan, or have a chilling effect on any future discussions concerning the loan in question or indeed any future loan the Council considers.

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<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/>



44. In reaching a decision on this case, the Commissioner has also taken into account the public interest arguments around transparency and accountability and the complainant's representations regarding concerns about the Council's decision making in respect of this loan. The Commissioner is of the view that the public interest in understanding what information was presented to the Cabinet in respect of the loan is considerable.
45. For the reasons set out above, the Commissioner does not consider that the Council has made a compelling public interest argument for withholding the information under regulation 12(4)(e) of the EIR. There is also an inherent presumption in favour of disclosure under regulation 12(2).
46. The Commissioner therefore finds that, on balance, the public interest in favour of disclosure outweighs the public interest in favour of maintaining regulation 12(4)(e) exception.

#### **Regulation 12(5)(e) – commercial confidentiality**

47. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
48. In this case the council is relying on regulation 12(5)(e) to withhold some information contained within the Cabinet Report, the CBRE Lending Proposal Document (an independent due diligence exercise on the borrower and advice on loan restructuring), the term sheet for investment facility and the actual loan documentation (comprising of 8 separate documents).
49. In his assessment of whether regulation 12(5)(e) is engaged, the Commissioner will consider the following questions:
  - Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality required to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
50. The Council considers that the information is commercial in nature as it "contains data and professional opinions relating to the finance, property details, regional and national markets and business performance and

prospects of the businesses in question, including the Council's own business and that of its advisers and valuers".

51. Having seen the withheld information the Commissioner accepts that it is commercial in nature. The first element of the test is therefore satisfied.
52. The Council has argued that the CBRE proposal document was provided to the Council on the basis that it would be used solely by the Council. In addition, the Council contends that the loan term sheet was provided to it on the basis that the terms contained within the loan were confidential and would not be disclosed to any third party without the consent of the lender, which has not been granted.
53. The Council confirmed that it had contacted CBRE who did not consent to disclosure. CBRE stated that it considered their report to be commercially confidential "due to the amount of information which has been provided by the Borrower (all the property details for example). Also, CBRE's analysis of the business accounts could have potential detrimental market implications for a listed company if made public as it would be considered commercially sensitive. It is also the case that CBRE were paid for their work on the report and would consider it a valuable appraisal that should not be disclosed for free to the detriment of their commercial interest".
54. In order to establish a common law duty of confidence the information must have the necessary quality of confidence. If the information is not trivial nor in the public domain, it has the necessary quality of confidence.
55. Based on the Council's representations and having viewed the withheld information the Commissioner accepts that it does have the necessary quality of confidence as it is not trivial nor is it in the public domain. Therefore, the second element of the test is satisfied.
56. The Council has argued that the confidentiality of the information is to protect its own interests as well as those of the borrower and its advisers. The Council explained that the borrower nor CBRE had consented to disclosure and if the information was disclosed it would be likely to harm its own and CBRE's relationship with the borrower. This is because the borrower may be deterred from working with the Council or CBRE again, or working with the parties on different terms.
57. The Council also contends that disclosure would prejudice the parties negotiating positions with other potential deals when entering negotiations in the future. This is because disclosure would provide other parties with an advantage in that they would be aware of terms and conditions which the Council had previously agreed.

58. Finally the Council considers that disclosure would be contrary to the external adviser's advice, which would in turn prejudice the Council's ability to transact with private sector advisors in the future. The Council considers that disclosure would set a precedent for disclosure of commercially sensitive information in the future.
59. The Council confirmed to the Commissioner that the initial basis on which it established that disclosure would prejudice the commercial interests of CBRE and the borrower were undertaken verbally. The Council also provided the Commissioner with email exchanges that had taken place between itself and CBRE in September 2021 and November 2022.
60. The Commissioner notes that the consultation between the Council and CBRE appears to only relate to the Lending Proposal document and not the other information which has been withheld. In addition, the Commissioner also notes that CBRE indicated that "a great deal" of the information was commercially sensitive, including third party reports and details of the terms of the loan. However, CBRE also asked the Council whether it would need to disclose parts of the report. Finally, the Commissioner has seen no evidence that the Council has formally consulted with the borrower.
61. Apart from the minor redactions in the Cabinet report, which appear to have been taken from the Lending Proposal document, the Council has applied regulation 12(5)(e) in a blanket fashion to a number of entire documents which comprise a significant volume of information. The Lending Proposal document and the Term Sheet comprise a total of 92 pages and the Loan documentation consists of 8 documents comprising over 300 pages in total.
62. The complainant has argued that the Council has failed to provide evidence or satisfactorily explain exactly *how* the harm it has asserted would occur. They consider that any well advised business person would be aware that any dealings with a public authority would be subject to disclosure under the FOIA or the EIR.
63. In terms of disclosure affecting the Council's ability to negotiate with third parties in the future if the terms of this loan were made public, the complainant contends that this harm would be minimal as any new loan agreement would be considered on a case by case basis. As such, the fact that specific terms were agreed in this particular case "would not be dispositive in other contexts". The complainant considers it unlikely that the Council has a 'one size fits all' approach to its investment activities. The Commissioner agrees that it is any loan terms that the Council agrees in the future would be on a case by case basis taking into account the specific issues associated with the loan, the parties involved, the amount of money involved, etc.

64. It is evident to the Commissioner that, due to the subject matter (a significant loan agreement to a third party) some of the information may cause prejudice to the commercial interests of third parties and possibly the Council itself.
65. However, in considering the Council's representations, the Commissioner notes that whilst it refers broadly to the potential adverse effects it considers disclosure would cause, no evidence has been provided that allows the Commissioner to understand exactly how and why these adverse effects would occur. The Commissioner also considers it relevant to note that the Council has applied its broad assertions to a significant volume of information (10 documents spread over 400 pages), with no apparent differentiation between the content and sensitivity of those documents.
66. Having had regard to the fairly simplistic arguments made by the Council – in conjunction with its application of the exception so widely to a substantial volume of information – the Commissioner considers that the Council has failed to explicitly demonstrate the causal link between the information and the claimed adverse effects. On this basis the Commissioner must find that condition (iii) has not been met, and that the exception is not engaged.

### **Procedural matters**

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67. Under regulation 5(2) of the EIR, a public authority must make environmental information available as soon as possible and no later than 20 working days after the date of receipt of the request.
68. Under regulation 14(2) a public authority must issue a refusal notice in respect of any excepted information within the same timescale.
69. Under regulation 11(4) a public authority should provide an internal review decision as soon as possible and within 40 working days of the request for one.
70. In this case, the complainant submitted their request on 1 September 2021 and the Council did not issue a refusal notice until 24 November 2021. The complainant requested an internal review on 26 November 2021 and the Council did not provide the outcome of its review until almost a year later on 21 November 2022. In its internal review the Council disclosed some information and relied on new exceptions (regulations 12(4)(e) and 12(5)(b)) which it had not cited in its refusal notice.
71. In light of the above, the Commissioner therefore finds that the Council breached regulations 5(2), 14(2) and 11(4).

## Other matters

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72. The Commissioner has previously issued a range of similar decision notices (e.g., FER0771845<sup>2</sup>, IC-40526-Y9V6<sup>3</sup>, IC-42754-K5L1<sup>4</sup>, IC-176115-R6W6<sup>5</sup>, etc.) finding that a public authority has sought to apply an exemption in a 'blanket' approach, without considering the differing content and sensitivity of information.
73. The Commissioner reminds the Council that in cases where a public authority seeks to withhold information, this should be done with careful consideration of the actual content of the information, at a granular level if necessary. Should a public authority consider that such consideration would place a grossly oppressive burden upon it, due to the request seeking a substantial volume of information, from which the potentially exempt information cannot be easily isolated, then regulation 12(4)(b) provides an exception in respect of manifestly unreasonable requests where the cost or burden of dealing with it is too great.

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615487/fer0771845.pdf>

<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619443/ic-40526-y9v6.pdf>

<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4018391/ic-42754-k5l1.pdf>

<sup>5</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024451/ic-176115-r6w6.pdf>

## Right of appeal

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74. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

75. 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.

76. 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 .....**

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**