

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2015

Public Authority: Royal Borough of Kingston upon Thames

Address: Guildhall
High Street
Kingston upon Thames
Surrey
KT1 1EU

Decision (including any steps ordered)

1. The complainant requested from the Royal Borough of Kingston upon Thames ("the Council") information about its Lender Option Borrower Option ("LOBO") loan agreements. The Council provided some information but withheld other information under section 43(2).
2. The Commissioner's decision is that the Council has incorrectly applied section 43(2) to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant the information that it has withheld under section 43(2).
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

5. On 14 March 2015 the complainant requested the following information from the Council under FOIA:

"1. How many Lender Option Borrower Option (LOBOs) contracts do you have on your books?

2. When were they signed and by whom?

3. With which financial institutions were they taken out?

4. Who advised the council to enter the LOBO(s)?

5. Since each Contract has been signed, has the lender exercised their option and changed the interest rate?

6. If so, please specify the dates of the interest rate changes and the revised interest rates.

7. Please provide a copy of the original, signed LOBO agreements."

6. The Council responded on 2 April 2015. It provided information for parts 1, 2, 3, 5 and 6 of the request. In relation to part 4 of the request, it indicated that it did not take specific advice to enter into the relevant LOBO loan agreements, though general advice on Treasury Management activity, including LOBO loan agreements, had been provided by external consultants throughout this period. In relation to part 7 of the request, it refused to provide the signed LOBO loan agreements, citing section 43(2) of FOIA.
7. The complainant requested an internal review on 21 April 2015. The Council provided the outcome of its internal review on 12 June 2015. It provided further information in relation to part 4 of the request detailing who the Council's Treasury Management advisers had been for specific periods. In relation to part 7 of the request, it provided redacted copies of the LOBO loan agreements with some information withheld under section 43(2).

Scope of the case

8. The complainant contacted the Commissioner on 20 July 2015 to complain about the way his request for information had been handled. He specifically complained about the Council's application of section 43(2) to the information that it withheld.
9. The Commissioner considered whether the Council had correctly applied section 43(2) to the withheld information.

Reasons for decision

Section 43(2) – Prejudice to commercial interests

10. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person.
11. The Council argued that disclosure of the information withheld under section 43(2) would be likely to prejudice its own commercial interests.
12. The Council provided the complainant with copies of the relevant LOBO loan agreements but withheld details of the interest rates and interest payments contained in those agreements.

Engagement of section 43

13. The Commissioner initially considered whether the relevant criteria for the engagement of section 43(2) were satisfied.

The Council's arguments

14. The Council argued that disclosure of the withheld information would be likely to prejudice its own commercial interests. It explained that its LOBO loan agreements were relatively simple. At certain trigger dates the lender had the option to increase the rate of interest on the loan. They would take that decision based on their view of the prevailing market conditions, plus their own financial positions. It went on to explain that, if the lender sought to increase the rate, the Council could exercise its "borrower's option" to repay the loan without penalty.
15. However, the Council informed the Commissioner that these loans formed part of its external long term borrowings which were used to finance its historic and current capital expenditure. Were it to repay the loans, it is likely that it would have to replace the LOBO loans with alternative external borrowing, either from the Public Works Loan Board ("PWLB") or the market, unless it had significant cash reserves available, for example if it had received a significant sum from asset disposals.
16. The Council contended that if it disclosed the withheld information, the rates of interest and interest payments, then market lenders would become aware of the times at which it would be likely to require funding to replace a LOBO loan and also the rates that it would be seeking. It believed that this could in turn mean that potential new lenders could seek to profit from the knowledge that the Council needed funds at a particular rate by charging a higher rate than might otherwise be available.

17. In the Council's view, the potential impact of this risk was significant in financial terms. Although its largest LOBO loan agreement was £10 million, its 12 LOBO loans were for £61 million in total. It explained that having to pay "over the odds" by even 0.5% for this part of its portfolio would cost it £305,000 a year for the remaining life of the loans which was clearly detrimental to its commercial interests.
18. The Commissioner informed the Council that the complainant had made similar requests to other Councils in England and in some cases had received copies of LOBO loan agreements in full, including details of interest rates and interest payments. He provided a sample of these agreements and asked if the Council could identify any significant differences between the LOBO agreements provided to the complainant by other councils and those to which the Council was a party.
19. The Council confirmed that the sample of unredacted loan agreements supplied to the complainant by other local authorities contained clauses which did not differ significantly from the corresponding clauses in its own agreements. However, in its view, this was immaterial. From its perspective, the issue was whether it believed that disclosure of the information that it had withheld would impact adversely on its future ability to manage its external borrowings in the most cost effective way, by providing information to potential market lenders regarding its possible requirement for future funding. It had taken the view that the risk was material and therefore it did not wish to disclose the requested information.
20. The Council went on to point out that it was clear from information in the public domain that other Councils had taken a similar view to the one that it had taken and had refused to provide details of interest rates contained in their LOBO loan agreements. It believed that it was the responsibility of each Council to manage its own external borrowings and the associated risk appropriately and its judgement was that disclosure would add to the risks and was therefore not in the public interest. It had concluded that if other Councils viewed that risk differently, in the context of their own financial positions or for some other reason, that was a matter of judgement for them.

The complainant's arguments

21. In relation to the Council's application of section 43(2), the complainant commented that:

"As the Council points out in its arguments, the decision of the lender to exercise an option embedded within a LOBO loan contract will be made based on market conditions at the time i.e.

on the objectively determined value of the option instrument. This value is unaffected by disclosure of the option's existence.

The Council's argument that disclosure would lead to the prejudice it describes therefore rests on the potential effect that disclosure would have on the subsequent refinancing of LOBO loan debt. The Council asserts that knowledge of the rates currently paid by the Council would enable lenders to charge a higher rate of interest on new loans than they could otherwise, yet fails to describe how this supposed dynamic operates. In fact, the assertion is invalid - no such dynamic exists.

When the Council needs to borrow to fund capital expenditure - current or historic, including the refinancing of existing debt - it has, as the council points out, two avenues available to it: the Public Works Loan Board and the financial markets. The Council argues that disclosure of the interest rates in its LOBO loan contracts would tip the market off about the timing of the Council's borrowing needs and what rates it would be seeking when refinancing the loan. But these rates are always known, regardless of the timing i.e. the Council is always seeking the lowest possible rates on its borrowing."

22. The complainant pointed out that the rate available from the PWLB is derived from the current gilt prices according to a transparent methodology published by the Debt Management Office. He went on to argue that:

"Any market lender would therefore have to undercut this rate in order to secure the Council's business. Furthermore, each market lender would be acting in competition with all the other active lenders in the marketplace and would therefore be obliged to submit its lowest possible bid in order to secure the business.

The only possible situation in which the Council's assertion that it would not be able to avail itself of the market-determined rate might be true is one in which the market lenders were acting together, submitting inflated bids in order to force the Council to accept a higher rate. Such collusion is, in the first place, extremely unlikely since a) each of the lenders from which quotes were requested would need to be involved; and b) the benefit of such collusion would only accrue to one of the conspirators: the lender which ultimately refinanced the loan. Secondly, the existence of such collusion would necessitate such a degree of information sharing among market lenders as to render disclosure of current rates under FOI moot."

23. By way of summary the complainant argued that:

"To summarise: the time at which a lender exercises the option embedded in a LOBO loan is determined by prevailing market conditions and is not affected by disclosure of current interest rates; the rate available to the Council upon refinancing the loan is also determined by prevailing market conditions and is not affected by disclosure of the rates Council is currently paying. The harm to its commercial interests which the Council describes (i.e. paying "over the odds") could not therefore be a result of disclosure, rather it is an outcome inherent to the design of LOBO loan contracts."

The Commissioner's view

(i) Applicable interest within the exemption

24. The Commissioner considered whether the prejudice claimed by the Council is relevant to section 43(2). The Commissioner is satisfied, in light of the Council's arguments, that the potential prejudice that it has identified relates to its commercial interests.

(ii) The nature of the prejudice

25. The Commissioner next went on to consider whether the prejudice being claimed was "real, actual or of substance", that is that it is not trivial and whether there was a causal link between disclosure and the prejudice claimed. The Commissioner is satisfied that the prejudice being claimed is not trivial or insignificant and that there is the relevant causal link.

(iii) The likelihood of prejudice

26. The Council argued that the disclosure of the withheld information would be likely to prejudice its own commercial interests. In the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Tribunal confirmed that, when determining whether prejudice would be likely to occur, the test to apply is that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.*" (paragraph 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.

27. The Commissioner, having examined the withheld information, notes that the Council has disclosed details of the amount of money that it has borrowed for each of its LOBO loan agreements, together with details when full repayment is due. In respect of each agreement, it has

withheld details of the interest rates that are to be paid and when the interest payments are to be made.

28. The Commissioner notes that if any of the lenders who have existing LOBO loan agreements with the Council decided to exercise their option to increase the rates of interest on the loans at the appropriate trigger points, the Council could exercise its option to repay the loan without penalty. However, in order to repay the loan it is likely that it would need to borrow the same sum of money from another lender, either the PWLB or a lender in the private sector.
29. The Commissioner accepts that the disclosure of the interest rates that the Council is currently paying on its LOBO loans may be of some advantage to potential lenders that the Council might wish to approach, should it seek to obtain a new loan from an alternative lender to replace an existing LOBO loan.
30. The Commissioner therefore accepts that the disclosure of the withheld information may create a real and significant risk of some prejudice to the Council's commercial interests and that therefore section 43(2) is engaged. However, he notes that section 43(2) is a qualified exemption and so is subject to a public interest test. As part of that test, he must consider the severity of any prejudice that might occur to the Council's commercial interest from the disclosure of the withheld information.

Public interest test

Public interest arguments in favour of maintaining the exemption

31. The Council informed the Commissioner that it believed that the public interest favoured withholding the requested information because, as it had explained, disclosure of this information would be likely to prejudice its ability to obtain alternative funding at the most cost effective rate should it wish to exercise its "borrower's option" under its LOBO loan agreements at a future point.
32. The Commissioner's acceptance that section 43(2) is engaged in respect of parts of the withheld information means that he accepts that prejudice to the Council's commercial interest would be likely to happen if that information was disclosed. However, as he has indicated, he also needs to consider the severity of any prejudice that might occur.
33. The Council had explained that if a lender sought to increase the rate of interest on a LOBO loan, it could exercise its "borrower's option" to repay the loan without being subject to any penalty. If it did so, it would then need to obtain alternative borrowing, either from the PWLB or from private lenders. The Council argued that if the withheld information were made public, then potential alternative lenders that it might wish to

approach would be aware of the times at which it would be likely to require funding and the rates that it would be seeking the funding. The Council believed that those lenders could seek to take advantage of this situation by charging a higher rate than might otherwise be available.

34. If the Council were to seek an alternative source of borrowing, following a lender seeking to raise the interest rate on an existing LOBO loan, and the withheld information had been made public, whilst potential alternative lenders that it approached would know the existing rate of interest payable on the loan, they would not know the new rate of interest proposed by the existing lender, although this would presumably be closely linked to prevailing general interest rates at that time. It therefore appears to the Commissioner that in order to attempt to gain the business of the Council, any potential alternative lenders would need to try to ensure that they offered loans at interest rates below that offered by the PWLB and attempt to offer loans at interest rates below that being proposed by the existing lender. Any such potential lenders would also be aware that they were in competition with other lenders attempting to obtain the Council's business and consequently would need to offer loans at interest rates which were more attractive than those offered by their competitors. The consequence of these market forces should therefore be that the Council should be offered new loans at competitive rates of interest which may well be below that being offered by an existing lender.
35. In light of the above, whilst the Commissioner accepts that there might be some prejudice to the Council's commercial interests from the disclosure of the withheld information, he is not convinced that it would be severe.

Public interest arguments in favour of disclosing the information

36. The Commissioner recognises that there is a general public interest in accountability and transparency in relation to the activities of public authorities. In this case, disclosure of the withheld information would increase the Council's accountability and transparency in relation to the borrowing of money to finance the provision of services to the public. This would help the public to satisfy itself that money was being spent appropriately and wisely. This is particularly important in the current economic climate, where significant reductions in funding for local authorities means that there is great public concern about local authorities obtaining value for money.
37. The Council noted that the complainant had raised arguments in favour of disclosure on the basis that this was necessary to facilitate "*public accountability and transparency*" because the borrowings were "*very long term loans and also complex financial instruments with embedded*

derivatives which could severely damage the Council's financial position...". He had also argued that "...it is likely that they represent poor value for money when compared with PWLB loans over the same period" and that disclosure is necessary "...to assess the fair value of the loans and disclose the Council's true financial position publicly".

38. With regard to the complainant's arguments about the public interest in disclosure, the Council noted that the complainant had stated that the loans *"could severely damage the Council's financial position"*. It viewed this as speculation as it did not believe that the complainant would know whether the loans could severely damage the Council's financial position as he had not undertaken any detailed analysis to demonstrate that this was the case. It pointed out, however, that each year its external auditors carried out a review of its financial standing which took account of its external borrowing and lending, its levels of reserves, the stability of its budgetary position and other factors. The Council informed the Commissioner that this rigorous audit had not highlighted anything of the nature flagged by the complainant as something that it needed to address.
39. The Council also noted that the complainant had stated that *"it is likely that the loans represent poor value for money when compared with PWLB loans over the same period"*. The Council again believed that this was speculation as the complainant had not made a comparison between the rates at which the Council borrowed money under its LOBO loan agreements and rates of PWLB loans over the same period that the relevant loans were entered into. It was of the view that this point was significant as PWLB funding might be available more cheaply today but the time that needed to be considered was when it needed to borrow money in the period between December 2000 and April 2006. The Council explained that to ensure that the loans represented good value when they were raised, the Council would have carried out its own analysis at that time, with the support of its then Treasury Management advisors, before entering into these loans.
40. In terms of the complainant's comments that disclosure would assist in assessing *"...the fair value of their loans and disclose the Council's true financial position publicly..."*, it was the Council's view that the various requirements and practices it already had in place met this need without requiring the disclosure of the information requested.
41. The Council believed that it was an important point that its published annual accounts were prepared in accordance with the required accounting standards and included 'fair value' calculations of all financial instruments. These accounts were in the public domain and were subject to external audit by its auditors who verified that they had been properly prepared (in accordance with the various standards and requirements)

and that they presented a "true and fair view of the Council's financial position".

42. The Council also pointed out that it complied with the best practice requirements of the Chartered Institute of Public and Finance and Accountancy set out in the Treasury Management Code of Practice for Local Authorities. The Treasury Management Strategy (which sets out how the Council's borrowing and lending activity would be managed through the year) was set out by the Council annually and officers reported to the Audit and Governance Committee twice a year detailing how the Strategy had been operated during the year. It confirmed that these reports were available on its website.
43. Overall, the Council's view was that the significant risk of it being disadvantaged at some future date from putting the withheld information in the public domain outweighed the complainant's arguments in favour of disclosure, which it regarded as speculative, particularly in light of the arrangements in place to test his assertions (albeit indirectly), mitigate the potential consequences he had highlighted and provide the transparency that he purported to seek.
44. In relation to the Council's assessment of the public interest arguments that he had raised in favour of disclosure, the complainant noted that it had brushed aside his concerns that the LOBO loans in question could severely damage the Council's financial position and that, over the long term, they represent poor value for money when compared with PWLB loans on the basis that he had not conducted detailed analysis of the loans. He pointed to the circular nature of this reasoning that the public should not be permitted to carry out detailed analysis of the LOBO loan agreements because it had not carried out detailed analysis of the agreements. He went on to state that he did not believe that it required detailed analysis of individual LOBO loan agreements to reach the conclusion that, on the whole, they were not a good means for local authorities to borrow money.
45. The complainant referred the Commissioner to the ongoing inquiry by the House of Commons Communities and Local Government Select Committee into LOBO loan agreements and some of the evidence given to that Committee. He believed that this indicated that such loans did not represent good investments for local authorities. As the Council's loan agreements were of a similar type to those scrutinised by the Select Committee, the complainant argued that it was perfectly reasonable to hold them under suspicion without conducting a detailed analysis.
46. The Council argued that the complainant had cited selectively from some comments made during the ongoing Select Committee inquiry. In its

view, in order to determine whether a loan represented good value, the relevant comparison needed to be made against what alternatives were available at the time that the loan agreement was entered into, not the rate at which the Council could borrow today or could have borrowed during the intervening period. The Council explained that had it borrowed from the PWLB at the same time as it entered its LOBO loan agreements, and subsequently sought to exit the loan prematurely in order to borrow more cheaply, then the PWLB would have applied a premium (exit penalty). It informed the Commissioner that its LOBO loan agreements were structured in a way which meant that should the lender want to increase the rate, then the Council could exit without penalty at that point. It therefore contended that the apparent "lose-lose" situation referred to in the evidence to the Select Committee did not apply to it.

47. The complainant also argued that the public interest in disclosure was strengthened by a further issue highlighted in the Select Committee inquiry into LOBO loan agreements. This related to potential conflicts of interest concerning treasury management advisors, who were responsible for advising local authorities on LOBO loan agreements, in light of their potential relationships with interdealer brokers who arranged the loans.
48. In relation to this point, the Council explained that, as it had indicated in its response to the initial FOI request, its treasury management advisors provided advice on its treasury management strategy generally, and on the types of borrowing and investments which were currently available in the market. It informed the Commissioner that the advisors would also have provided advice on accounting treatments at the time the Council was producing its annual accounts. At no time did the Council seek their advice on any particular individual transaction or agreement. It therefore remained the Council's view that, in its case, no conflict of interest was present.
49. The complainant also argued that the dissolution of the Audit Commission earlier this year added to the public interest in disclosure as this resulted in a gap in the effective scrutiny of financial arrangements within local government.
50. However, the Council informed the Commissioner that it believed that the complainant's comments were factually incorrect. It contended that there had been no reduction in the requirements for financial transparency placed on local authorities, particularly (which was relevant in this matter) those relating to the preparation, publication and external audit of accounts. It explained that these requirements remained in place and that the external audit of its 2014-15 accounts

was recently completed by a national firm of auditors, whose appointment was now overseen by the National Audit Office.

51. With regard to the extent to which the Commissioner and the First-tier Tribunal (Information Rights) would be entitled to rely on the opinions of, and evidence presented to, a Select Committee when coming to a decision under FOIA, this is a matter which was considered by Burnton J in the High Court in *Office of Government Commerce v The Information Commissioner & HM Attorney General on behalf of the Speaker of the House of Commons* ([2008] EWHC 737 (Admin)). He concluded that:

"They may take into account the terms of reference of Committees and the scope and nature of their work as shown by their reports. If the evidence given to a Committee is uncontentious, i.e., the parties to the appeal before the Tribunal agree that it is true and accurate, I see no objection to its being taken into account. What the Tribunal must not do is refer to evidence given to a Parliamentary Committee that is contentious (and it must be treated as such if the parties have not had an opportunity to address it) or to the opinion or finding of the Committee on an issue that the Tribunal has to determine."

52. In the judge's view, a failure by the Commissioner or the Tribunal to follow this approach would result in a breach of Parliamentary privilege.
53. In light of the High Court's ruling, the Commissioner has not considered the detailed evidence presented to the Select Committee in reaching his decision. He notes, however, that the Select Committee set up its inquiry following a Dispatches programme on Channel 4 entitled "How Councils blow your millions" which raised questions as to whether LOBO loan agreements were appropriate forms of borrowing for local authorities. In the Commissioner's view this is indicative of there being a significant public interest in understanding more about how LOBO loan agreements operate and the impact that they may have on the finances of local authorities in the future.
54. The Commissioner notes that, in this case, the total value of the LOBO loan agreements entered into by the Council is £61 million. The length of the terms of these agreements is between 25-60 years. They therefore represent significant borrowings on the part of the Council which will have a major impact on its finances for many years to come. The Commissioner therefore believes that there is a significant public interest in the details of these long term financial commitments made on Council taxpayers' behalf by the Council being made public, particularly at a time when the finances of local authorities are under considerable pressure due to reductions in their income.

55. The Commissioner notes the Council's arguments as to the existing systems that are in place which provide scrutiny in relation to its finances. However, it does not appear to the Commissioner that these provide a detailed review of each of the LOBO loan agreements that it has in place. Without details of the interest rates to be paid under these loan agreements and details of when interest rate payments are due being available, it is not clear to the Commissioner how it would be possible for there to be analysis of the potential financial ramifications that they may have for the Council and assess whether the agreements that it has entered into represent good value for money.

Balance of public interest arguments

56. The Commissioner has accepted the Council's argument that section 43(2) is engaged and that, consequently, that disclosure of the withheld information would be likely to prejudice its commercial interests. However, as detailed above, he is not convinced that any such prejudice would be likely to be severe should the Council seek to obtain borrowing from alternative lenders to replace existing LOBO loan agreements, given the competitive environment in which this would take place.
57. The Commissioner believes that there is a significant public interest in allowing more detailed analysis of the financial commitments entered into by the Council and, consequently, greater public understanding of this issue, particularly given the very considerable sums of money involved and the potential long term nature of these commitments.
58. After weighing the public interest arguments, the Commissioner has determined that the public interest factors in not prejudicing the commercial interests of the Council do not outweigh the public interest factors in favour of disclosure. The Commissioner has therefore decided that the withheld information is not exempt from disclosure under section 43(2) and that it should be disclosed to the complainant.

Right of appeal

59. 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@hmcts.gsi.gov.uk

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

60. 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.
61. 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

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