

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2016

Public Authority: Solihull Metropolitan Borough Council

Address: Council House
Manor Square
Solihull
West Midlands
B91 3QB

Decision (including any steps ordered)

1. The complainant requested from the Solihull Metropolitan Borough Council ("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) except for the bank details of the Council and the lenders and the signatures of individuals that signed the LOBO loan agreements.
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 7 May 2015, the complainant wrote to the Council and requested following information 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 19 May 2015 and provided some information within the scope of the request but refused to provide the remainder. It cited sections 41 and 43(2) as a basis for withholding information.
7. The complainant requested an internal review on 1 June 2015. The Council provided the outcome of its internal review on 12 June 2015 in which it revised its position. It withdrew its reliance on section 41 and disclosed additional information. However, it continued to rely on section 43(2) to withhold some information contained in its LOBO loan agreements.

Scope of the case

8. The complainant contacted the Commissioner on 11 September 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 had withheld. During the course of the Commissioner's investigation the complainant confirmed that he did not wish to complain about the Council's withholding of the bank details of

the Council and the lenders and the signatures of individuals that signed the LOBO loan agreements.

9. The Commissioner considered whether the Council was correct to apply 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 its six LOBO loan agreements with some details redacted. These details included the interest rates payable on the loans, the length of the loan agreements, when interest payments were to be made, the length of notice required from the lenders to increase interest rates, the dates when the lenders could exercise their options to increase interest rates, the amount of notice required from the Council to make repayments other than on scheduled dates and the security provided in respect of the loans.

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.
15. The Council explained that when originally considering the application of the exemption, its Treasury Manager was asked whether the prejudice was a hypothetical risk or whether there was actually past evidence that could be relied upon to evidence the reality of the risk. Her view was that, based on past experience, it was not purely a hypothetical risk.
16. The Council argued that:

"To release in full the contracts requested would prejudice the Council's ability to secure best value in loan negotiations in the future. If these documents were made public, banks would know the terms and conditions, as well as rates that have been

acceptable to the Council in the past, which would affect our ability to negotiate an advantageous deal in future, and could increase the future interest payments on the current loans. To quantify the impact of this, a 0.01% change in the interest rate achieved on a 50-year, £10m bullet-repayment loan would have a £50,000 impact on the Council over the loan term."

17. With regard to the likelihood of prejudice or harm, the Council's view was that:

"If deal terms and rates become widely known, this can have a negative impact on the Council. A situation has arisen before where wider knowledge of a deal offered to a number of Local Authority counterparties has caused issues which ultimately resulted in an advantageous offer being withdrawn. This is particularly pertinent in this case, given that in a number of these arrangements, the lender has the option to increase the interest rate at a number of agreed intervals ('call' dates), which it would be more likely to do if the detailed financial information is disclosed. This could potentially trigger the refinancing of the loans."

18. The Council went on to explain that the LOBO loan agreements were long-term loans and some had substantial periods before maturity. It believed that if information regarding the details of these loans was released, it would impact upon its ability to secure value for money in future negotiations for the reasons given above.

The complainant's arguments

19. The complainant noted that the Council had argued that to release in full the contracts requested would prejudice its ability to secure best value in loan negotiations in the future as banks would know the terms and conditions, as well as rates that had been acceptable to the Council in the past, which might affect its ability to negotiate an advantageous deal in future.
20. The complainant argued that banks make lending decisions, and determine the interest rate offered to a borrower, based on the lender's creditworthiness and the prevalent market conditions at the time. He stated that previous responses to requests made to other local authorities indicated that there are upwards of 40 financial institutions operating in the local authority loan market, competing with each other to secure business. He did not therefore believe that the conditions of a past loan would affect the loan offers received from banks over 10 years later, under a completely different set of market conditions.

21. In response to this, the Council argued that whether the loan was taken out last year or 10 years ago was irrelevant. It argued that due to the nature of LOBO loans that if the interest rate were disclosed this could disadvantage it in future loan negotiations. The Council explained that if the lender exercised its right to increase the interest rate at a specified future 'call' date, the Council would have the option to accept the new interest rate or take out a new loan to repay the original loan. It believed that if the initial loan rate was known by the new loan providers it could influence any negotiations the Council undertook in re-financing due to the loss of competitive advantage. As it had stated previously, 0.01% change could have a significant impact over the period of the loan.
22. The Council explained that, for example, using a hypothetical figure of 2%, if the lender were to exercise their right and increased the interest rate to 3% as part of the loan agreement the Council could look elsewhere to see if could get a better rate. If a potential lender knew what rate the council was paying this severely prejudiced the Council's negotiating position. It contended, furthermore, that if a current lender knew the rate of the Council's other LOBO loans this commercial advantage gained would trigger the likelihood that the lender would exercise the right to increase the interest rate on an agreement and adversely affect the Council.
23. The complainant further noted that the Council had argued that if deal terms and rates become widely known, this could have a negative impact on it. As evidence of this it had referred to a situation that had arisen before where wider knowledge of a deal offered to a number of Local Authority counterparties had caused issues which ultimately resulted in an advantageous offer being withdrawn. The Council believed that this was particularly pertinent in this case, given that in a number of these arrangements, the lender has the option to adjust the interest rate at a number of regular intervals, which it might be more likely to do if this information was disclosed. This in turn could potentially trigger the refinancing of the loan.
24. The complainant argued that a situation that has arisen before did not constitute empirical evidence. He informed the Commissioner that, furthermore, previous requests made under FOIA had shown that LOBO loans were frequently resold on the open market and change hands between banks frequently. The fact that the Council was party to 6 LOBO loans was therefore a very poorly kept secret among LOBO lenders. He pointed out that, in addition, the 6 loans were held by only three lenders. The complainant argued that these lenders might well act in concert to raise the Council's interest rates but the decision to act would be determined by prevalent market conditions, not disclosure to the wider public of the loan agreements.

25. The Council stated, as a general comment, when entering into negotiations it could not always be fully open and transparent otherwise it prejudiced its ability to secure the best deals it could. For example, when entering into land or property acquisitions if the amount of money the Council would be prepared to pay was known the land/property owner would ask for nothing less, or for example, when negotiating contracts or negotiating loan deals.
26. The Council went on to explain that it had been disadvantaged due to commercial information being made publically available in the past. It informed the Commissioner that it was one of a number of Local Authorities that negotiated a preferential investment rate on a deposit with a bank counterparty. This information was made publically available and another local authority who was currently a direct customer approached the bank and challenged why they did not have access to the investment rate. The Council explained that the bank then had to withdraw the investment rate offer and return the funds to the Council and the Council reinvested at a lower rate with another counterparty. The Council believed that this was an example when it had been directly prejudiced financially by information becoming publically available.
27. It was contended by the Council that if the financial detail of the individual LOBO loan arrangements were in the public domain, it would suffer a competitive disadvantage that would adversely affect the ability of the Treasury Management function to negotiate best value on similar loan arrangements when triggered in the future.
28. The complainant pointed out that the interest rate on loans available from the Public Works Loan Board ("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."

29. 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

30. 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

31. 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

32. 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.

33. The Commissioner, having examined the withheld information, notes that the information withheld by the Council includes the interest rates payable on the LOBO loans, the length of the loan agreements, when interest payments were to be made and the length of notice required from the lenders to increase interest rates.
34. The Commissioner understands 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.
35. 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.
36. 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

37. The Council was of the view that the public interest favoured withholding the requested information because, as it had explained, disclosure of the withheld information would be likely to prejudice its ability to obtain best value in future negotiations over loans. It believed that if the withheld information were to be disclosed to the public, banks would know the terms and conditions, as well as rates that it had accepted in the past, which would affect its ability to negotiate an advantageous deal in future. This could lead to an increase in interest payments in future on its loans.
38. 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.

39. The Commissioner notes that, 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 would be offered new loans at competitive rates of interest which may well be below that being offered by an existing lender.
40. The Commissioner notes the Council has provided an example of circumstances in which an advantageous investment offer that had been made to it by a bank had been withdrawn after this information was made publicly available. However, the Commissioner is not convinced that the disclosure of details of existing LOBO loans would be likely to cause the relevant lenders to seek to increase the interest rates applicable to agreements entered into a considerable time ago under different economic and market conditions to those that exist now. The Commissioner believes that lenders are much more likely to be influenced in deciding whether to seek to increase interest rates on loans by current market conditions rather than by whether the details of an agreement have been placed in the public domain.
41. 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

42. 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.

43. The complainant noted that that the Council, in its response to the request for internal review, had argued that in the case of LOBO loans it had the fair value of its LOBO loans assessed annually as part of its final accounts process. This service was included in its treasury advice contract (currently with Capita) but could also be conducted in-house if necessary. He contended that there are serious concerns over the independence of these external advisers (in this case Capita) due to their relationships with the brokers who arranged such loans. He indicated that these concerns were initially raised during the Communities and Local Government Committee inquiry into local authority investments in Icelandic banks in 2008 and were again highlighted in a Channel 4 documentary about LOBO loans in 2015.
44. In the complainant's opinion, the involvement of such firms of advisers in the decisions to enter into LOBO loan agreements therefore added further weight to the public interest argument in favour of disclosure. He believed that if the Council has entered into loan agreements that proved to be poor value for money or which incurred unnecessary costs that jeopardised the provision of essential services, and they had done so on the advice of compromised advisers, then it was vital that this information was brought to light so that appropriate action could be taken.
45. The complainant went on to argue that it was important to note, in this context, that the abolition of the Audit Commission earlier this year had left a potential gap in the effective scrutiny of financial arrangements within local government. He pointed to a statement from the Right Honourable Margaret Hodge MP, Chair of the Public Accounts Committee, who said on the publication of its report into local government funding in 2014:

"If this system of local accountability is to work effectively, residents and councillors must have access to relevant and comprehensible information."

46. The Council noted that the complainant had stated that there was a clear public interest in being able to effectively scrutinise the Council's borrowing decisions, including by comparing LOBO loans to the cost of borrowing from the PWLB to assess value for money. The Council informed the Commissioner that it was assured by its Treasury Manager that the Council would have considered the relative costs of PWLB loans when making its borrowing decision, as well as considering other important variables such as the structure of the debt portfolio.

47. The Council also noted that the complainant had made the point that there was a very strong specific public interest in being able to scrutinise LOBO loan contracts. The Council argued that whilst it agreed in principle that the scrutiny of financial decisions was important, it did not accept that it followed that it should always be by public scrutiny. It pointed out that, for example, local authorities decisions could be scrutinised in a number of ways such as by Elected Members and Committees or external auditors. The Council explained that in the case of LOBO loans, it had the fair value of its loans assessed annually as part of its final accounts process. This service was included in its treasury advice contract (currently with Capita) but could also be conducted in-house if necessary.
48. The Council informed the Commissioner that the fair value of its overall LOBO portfolio was given annually in its published accounting statement. It stated that interest rate risk and refinancing risk were taken very seriously by the Council's Treasury Management team and that further details on how these risks were managed could be found in the Council's published annual accounts and published Treasury Management Strategy. It noted that it had also adopted the CIPFA Treasury Management Code of Practice.
49. The Council explained to the Commissioner that its treasury advisors assessed the fair value of its LOBO and PWLB loans as a requirement of the CIPFA Code of Practice on Local Government Accounting and that this work was audited externally by qualified auditors as part of the process to approve the annual accounting statement.
50. The Council further explained that its treasury management function was subject to regular internal audit reviews. In addition, its Treasury Management Strategy was scrutinised and approved by Audit Committee (committee of Members and Independent external co-opted appointees) and then Full Council. There were also regular monitoring reports and half year reviews of the treasury management activity were scrutinised by Audit Committee. The Council was therefore of the opinion that sufficient effective scrutiny of the treasury management function was in place.
51. Taking all the above into account, the Council believed that there were more than sufficient checks and balances in place to scrutinise the LOBO loans and whilst the information sought might be of commercial interest to certain members of the public, or of a general interest to some members of the public, the overall public interest did not favour prejudicing the Council's commercial interests. It also emphasised that as a Council delivering services to the residents of Solihull, any financial prejudice caused by disclosure had the potential to negatively impact on the services it delivered.

52. 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.
53. 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.
54. 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."*
55. 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.
56. 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.

57. The Commissioner notes that, in this case, the value of the LOBO loan agreements entered into by the Council represents a very significant amount of money and that the agreements, if they run their course, are for lengthy terms. 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.
58. 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 such as the interest rates to be paid under these loan agreements and the length of the agreements 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

59. 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.
60. 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.
61. 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

62. 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

63. 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.
64. 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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