

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2024

Public Authority: Thurrock Council
Address: Civic Offices
New Road
Grays
RM17 6SL

Decision (including any steps ordered)

1. The complainant has requested a copy of a letter sent to Thurrock Council (the Council) by a financial consultancy firm. The Council refused to disclose the requested information, citing section 43(2) (commercial interests) of FOIA as its basis for doing so.
2. The Commissioner's decision is that the Council correctly applied section 43(2) of FOIA to withhold the requested information, and that the public interest favours maintaining the exemption. However, the Council breached section 10(1) of FOIA as it failed to provide a response within the statutory 20 working day timeframe.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 20 December 2022, the complainant wrote to the Council and requested information in the following terms:

"I understand that the financial consultancy Arlingclose wrote to the Council's then Section 151 Officer, [redacted], in March 2018 to express urgent concern about the Council's strategy of investing large sums of money borrowed from other local authorities.

Please provide a copy of the March 2018 letter from Arlingclose.”

5. The Council responded on 3 October 2023. It withheld the requested information under section 43(2) of FOIA.
6. Following an internal review the Council wrote to the complainant on 25 April 2024. It upheld its reliance on section 43(2).

Reasons for decision

Section 43 – commercial interests

7. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
8. In order for section 43(2) to be engaged, three criteria must be met:
 - The harm which the public authority envisages must relate to someone’s commercial interests;
 - The public authority must be able to demonstrate a causal relationship between disclosure and prejudice to those commercial interests. The resultant prejudice must be real, actual and of substance; and
 - The level of likelihood of prejudice being relied upon by the public authority must be met (that is, it must be shown that disclosure would, or would be likely to, result in prejudice occurring).
9. The Council has argued that disclosure of the requested letter would be likely to cause prejudice to its own, Arlingclose’s and the former section 151 officer’s commercial interests.
10. If the prejudice envisaged by the public authority relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner (EA/2006/0014)*, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third parties, arguments which are advanced by a public authority should be based on its prior knowledge of the third party’s concerns.
11. In this case, the Council confirmed that, at the time of submitting its arguments to the Commissioner, Arlingclose had not responded to its requests for comment relating to the complainant’s request for

information. Nor has the Council put forward any evidence of consultation with, or prior knowledge of, the former section 151 officer's concerns relating to any disclosure of the requested letter. Therefore, for the purpose of this decision, the Commissioner has only considered the arguments advanced by the Council in relation to the prejudice that disclosure would be likely to cause to its own commercial interests.

12. The Council confirmed that, at present, it is implementing its investment recovery strategy, and key to this strategy is avoiding anything which may appear to be a fire sale or a disposal of distressed assets. The Council believes that release of the requested information at this stage may be detrimental to the success of that strategy.
13. The Council explained that its recovery strategy involves realising the value of assets, both where it has been integral to placing organisations into administration, and from disposing of performing assets or investments. It considers that market perception of the Council is likely to impact on both.
14. Acknowledging that there is already information about its position in the public domain, the Council stated that it is important to avoid putting out further information which may cause the perception of its position to deteriorate further, or make the market nervous or feel that there is opportunity to underbid where assets or investments go to market.
15. The Council, working with the administrators of the solar assets, successfully implemented the recovery strategy to achieve a sale of a substantial value. Other Council assets and investments have also been successfully sold.
16. However, the Council still has some final high value assets to be sold as part of the recovery strategy. Whilst the Council has appointed experienced sales agents, it is selling these remaining assets directly, unlike in the case of the solar assets which were marketed and sold by a third party and had an element of separation from the Council. Therefore, the Council considers it especially important to manage the risk of any potential adverse publicity during the sale process.
17. The Council emphasised this point by highlighting that a discounting of the sale price by even 1% could lead to a loss of return running into hundreds of thousands of pounds. It acknowledged that it cannot put a definitive figure on what the effect of disclosure at this stage would have on asset value, but it would likely be more than mere embarrassment. Therefore, given the risk of substantial prejudice from even a very small impact, the Council considers it prudent not to put any further information into the public domain at this stage.

18. The Council confirmed that informal market testing is underway, and it is anticipated that the sale should be completed this financial year. It acknowledged that, after the sale is completed, this particular limb of its argument asserting that disclosure would likely prejudice its commercial interests will no longer carry any weight.
19. The Council also went on to explain that since the original request for information was made, it has either issued proceedings against, or is in pre-action correspondence/negotiation with, a number of parties relating to various assets and investments. The view of the Council's advisors is that the requested letter may be disclosable in some court proceedings but not in others. The Council considers that this raises two points.
20. Firstly, in the event that the letter isn't disclosable in court proceedings but the letter is disclosed into the public domain under FOIA, it could give a prospective defendant a negotiating and a litigation benefit they would not be able to obtain through the ordinary course of proceedings.
21. Secondly, and probably more importantly, the court process will include a timetable when the parties are required to disclose documents to each other and if Council documents came into the public domain, and as such, available to prospective defendants before a reciprocal exchange was provided, that would place the Council at a disadvantage in any pre-action negotiations.
22. The Council concluded by confirming that if the requested letter is disclosed to all potential defendants as part of the litigation process or proceedings are concluded, that would remove any viable argument of prejudice, but unless and until that position is reached there is a material risk that disclosure at this stage could have a detrimental impact to the Council's litigation strategy.
23. With regard to the three criteria set out in paragraph 8, the Commissioner is satisfied, firstly, that the prejudice envisaged by the Council relates to its commercial interests. His guidance¹ explains that a commercial interest relates to a legal person's ability to participate competitively in a commercial activity and the Council's arguments are concerned with those matters.

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

24. Secondly, the Commissioner is satisfied that the Council has demonstrated that a causal link exists between disclosure of the requested information and the envisaged commercial prejudice.
25. Finally, the Council confirmed that it considers that the commercial prejudice would be likely to happen, and the Commissioner accepts the lower threshold of likelihood in this case; that the envisaged prejudice would be likely to happen, rather than would undoubtedly happen.
26. Since the three criteria set out in paragraph 8 have been satisfied, the Commissioner accepts that disclosing the requested information would be likely to result in prejudice to the Council's commercial interests, namely its recovery and litigation strategies. The exemption at section 43(2) of FOIA is engaged.
27. The Commissioner will now consider the public interest factors in favour of disclosing the requested information or continuing to withhold it.

Public interest test

28. Section 43(2) is subject to the public interest test, as set out in section 2 of FOIA. This means that although the exemption is engaged, the requested information must still be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.

Public interest factors in favour of disclosure

29. The complainant has argued that the Council has received central government intervention due to the severe state of its finances. They referenced a Best Value Inspection report that was published by the government in May 2023, which they state is sufficient to demonstrate the extremely high weight that should be applied to the public interest in disclosure. The complainant provided the following quote from the foreword of the report:

"...we have learned that the difficulties facing Thurrock Council are extremely serious. The Council faces significant losses from its investments and a likely on-going structural budget deficit. In this context, placing local services on a secure and sustainable footing will be a major undertaking."

30. The complainant stated that they disagree that disclosure of the requested information could prejudice the Council's commercial interests, and if the Council has mismanaged council taxpayers' money it is very much in the public interest for the information to be disclosed.

31. The complainant further argued that it is current public knowledge that the Council has lost significant amounts of money on its investments. Therefore disclosure will not cause detriment to the Council's commercial interests as the damage has already been done.
32. The Council has acknowledged that disclosure of the requested information would inform the public of activities carried out on their behalf, and allow for scrutiny of decisions and spending of public monies.

Public interest factors in favour of maintaining the exemption

33. For the most part, the Council set out its factors in favour of maintaining the exemption during its arguments to demonstrate that the exemption was engaged. However, it reiterated that disclosure of the requested information at this time could be detrimental to the Council's recovery and litigation strategies, and consequently disadvantageous to its residents and tax payers.

Balance of the public interest

34. In reaching a decision on the balance of the public interest, the Commissioner considers that the public interest means the public good, rather than what is of interest to the public.
35. The Commissioner accepts that there is public interest in transparency about the Council's decision making in relation to how it spends public money, particularly given the unprecedented financial situation that the Council is in.
36. However, having considered both the Council's and the complainant's arguments, along with information already available in the public domain - including the Council's financial position, what led it to being in that position, the government intervention, references to the letter from Arlingclose and the Council's ongoing efforts to restore stability - the Commissioner is not persuaded that the requested information is of notable value to the general public. Further, the Commissioner considers that the large amounts of information placed into the public domain about the Council's financial position, by both the Council itself and numerous third party sources, meets the general public interest and expectation of transparency to a satisfactory degree.
37. The Commissioner is satisfied that there is little, if nothing at all, to be gained by the public from disclosure of the requested information. As such, the balance of the public interest weighs greatly in favour of the Council being able to continue to carry out its recovery and litigation strategies unhindered, with the aim of restoring financial stability and sustainability, which is in fact in the interest of the Council's residents.

38. The Commissioner therefore finds that the Council was entitled to refuse to disclose the requested information in accordance with section 43(2) of FOIA.

Procedural matters

39. Section 10(1) of FOIA provides that, subject to sections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
40. In this case the Council did not provide the complainant with a response to their request until some nine and half months after the date of receipt. Therefore, the Commissioner finds that the Council breached section 10(1) of FOIA.

Right of appeal

41. 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

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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Michael Lea
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