

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 July 2020

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

#### Decision (including any steps ordered)

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1. The complainant requested information relating to money borrowed by Thurrock Council (the Council) from other local authorities and information relating to the amount lent by the Council to other local authorities.
2. The Council refused to provide the requested information citing sections 43 (commercial interests) and 36 (prejudice to effective conduct of public affairs) of the FOIA.
3. The Commissioner's decision is that the Council was entitled to apply the section 43 exemption.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

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5. On 2 October 2019, the complainant wrote to the Council and requested information in the following terms:

*"The first part of my request relates to money borrowed by the council from other local authorities, as detailed by the government's borrowing and investment live table which can be found here: <https://www.gov.uk/government/statistical-data-sets/live-tables-on-local-government-finance>*

*According to the table, the council's outstanding borrowing relating to loans (both short and long-term) from other local authorities was £1,039,900,000 as of Q1 2019/20.*

*In regards to the above figure, I would like to know:*

*For each individual loan taken by the council:*

*1. The local authority/lender name*

*1.1 The amount advanced (the initial amount received)*

*1.2 The outstanding balance*

*1.3 The interest rate*

*1.4 The settlement date (the date the loan was agreed)*

*1.5 The agreed maturity date (the date on which the loan is set to end)*

*1.6 Brief summary of the purpose of the loan*

*1.7 Any platform used during the borrowing process (for example iDealTrade.net)*

*According to the table referenced above, the total outstanding amount lent by the council to other local authorities was £41,000,000 as of Q1 2019/20.*

*In reference to this figure, I would like to know:*

*2. For each individual loan:*

*2.1 The local authority/lender name*

*2.2 The amount advanced (the initial amount received)*

*2.3 The outstanding balance*

*2.4 The interest rate*

*2.5 The settlement date (the date the loan was agreed)*

*2.6 The agreed maturity date (the date on which the loan is set to end)*

*2.7 Any platform used during the borrowing process (for example iDealTrade.net)*

*2.8 Where Thurrock Borough Council got the money from".*

6. The Council responded on 1 November 2019. While it provided some general information about its borrowing and lending, it refused to provide the requested information, citing section 43 (commercial interests) of the FOIA as its basis for doing so.
7. Following an internal review the Council wrote to the complainant on 29 November 2019, maintaining its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 2 December 2019 to complain about the way his request for information had been handled.
9. He told the Commissioner:

*"As of Q1 2019/20, Thurrock Borough Council had £1.039 billion in loans from other local authorities (to put this in context, that's 20 times the national average and 41% higher than the next biggest borrower).*

...

*I believe the public interest in favour [sic] of disclosure (outweighing the hypothetical risk described by the council) and certainly does not support withholding all the requested information in its entirety".*

10. As a minimum, he considered that the Council should disclose all the requested information other than the interest rates for each loan.
11. Where possible the Commissioner prefers complaints to be resolved by informal means. Accordingly, she advised the Council that the complainant had indicated the way in which his complaint could be resolved informally.
12. The Council declined to close matters informally. Instead, in its submission to the Commissioner it confirmed its application of section 43(2) and additionally cited section 36(2)(b) (prejudice to effective conduct of public affairs) of the FOIA in respect of all the withheld information.
13. The Council advised that it had written to the complainant informing him of its revised position.
14. The Commissioner accepts that a public authority has the right to claim an exemption for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.

15. In correspondence with the Commissioner, the complainant confirmed that he disputed the Council's application of section 36 in this case.
16. Although the Commissioner understands from the complainant that some other councils would appear to have complied with similar requests, she does not consider that this sets an automatic precedent for disclosure under the FOIA. Each case must be considered on its merits.
17. The Commissioner's role is to determine whether the Council dealt with the request appropriately.
18. The analysis below considers the Council's application of section 43 of the FOIA to the withheld information.

## **Reasons for decision**

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### *Section 43 commercial interests*

19. Section 43(2) of the FOIA states that:

*"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."*

20. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
  - first, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
21. In relation to the lower threshold of likelihood the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold of likelihood, in the Commissioner's

view this places a stronger evidential burden on the public authority to discharge.

*The complainant's view*

22. The complainant disputed the Council's application of section 43 in this case. He told the Council:

*"I do not believe the exemption has been properly applied and, even if it had, I argue strongly that the public interest in disclosure outweighs that of withholding the information".*

23. He explained:

*"The request relates to information about already completed financial transactions... Their [sic] is no basis to believe there is a substantial risk of prejudice involved in the public knowing who the council is borrowing from/lending to and the terms of those loans".*

*The Council's view*

24. In correspondence with the complainant, the Council explained:

*"The Council has an ongoing borrowing requirement to fund capital investments in Green Energy Bonds and ongoing capital expenditure that the Council maintains via borrowing in the money markets from other Local Authorities on a rolling basis".*

25. With respect to its refusal to disclose the requested information, it told him that it would be detrimental to the Council in its ongoing borrowing activities to release individual loan details. Similarly, with respect to that part of the request relating to its lending deals it told him:

*"... it would be detrimental to the Council to release details of individual deals".*

26. In support of those views, it told him:

*"The Council believes strongly that by releasing details of loans (received and provided in the past) will have a negative commercial impact as:*

- It would weaken its position to be able to negotiate competitively in the future*
- It could result in the Council's working relationships with lenders/borrowers breaking down".*

27. In its submission to the Commissioner, the Council confirmed its view that disclosure in this case:

*"... would prejudice its own commercial interests and the commercial interests of the other parties involved (specifically lenders/borrowers)".*

*The Commissioner's view*

*The applicable interests*

28. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated, which in the case of section 43(2), is commercial interests.
29. In the Commissioner's view, a commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.
30. The Commissioner is satisfied that, in the context of the request in this case, the information relates to a commercial interest. She is also satisfied that the commercial activity involved – whether lending or borrowing - is conducted in a competitive environment.
31. Therefore, with regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Council clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.

*Nature of the prejudice*

32. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
33. Secondly, there must be what the Tribunal in the case of *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030) called a 'causal link' between the disclosure and the prejudice claimed. The authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice.
34. The Commissioner considers that the prejudice test is not a weak test: an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, real, actual and of substance.
35. The Commissioner considers it important that, in claiming the section 43 exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does, in

fact, represent or reflect the view of the third party. The Commissioner expects a public authority to consult with the third party for its view.

36. In this case, the Commissioner is not satisfied that the Council demonstrated that it had consulted directly with the relevant third parties in order to establish whether they had any objection to their information being disclosed.
37. The Commissioner cannot therefore be satisfied that disclosure of the information would, or would be likely to, prejudice or harm the commercial interests of third parties.
38. In determining whether or not the effect of disclosure in this case would be detrimental or damaging in some way to the commercial interests of the Council itself, the Commissioner has considered the nature and likelihood of harm that would be caused.
39. The Commissioner recognises that there may be circumstances where the release of information held by a public authority could damage its reputation or the confidence that customers, suppliers or investors may have in it.
40. During the course of the Commissioner's investigation, the Council provided evidence in support of its view that its own interests, in terms of its relationships with lenders and its future ability to obtain loans, would be damaged by disclosure of the requested information. This evidence can be linked to the Council's recent analysis of the impact of national news articles on its inter-authority lending arrangements.
41. The Commissioner is satisfied that disclosure of the requested information has the potential to harm the Council's own commercial interests. She accepts that the disclosure of the withheld information may impact on the Council's ability to compete for business. She considers it plausible that disclosure has the potential to impact on the commercial interests of the Council, namely its ability to generate income by way of inter-authority lending.

*The likelihood of prejudice*

42. With regard to the third criterion, the Council considered that disclosure in this case would be detrimental to the Council. In other words, it considered the higher level of prejudice was relevant.
43. The Commissioner's guidance on section 43 of the FOIA states:

*"The term "would...prejudice" means that prejudice is more probable than not to occur (ie a more than a 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).*

*"Would be likely to prejudice" is a lower threshold. This means that there must be more than a hypothetical or remote possibility of prejudice occurring. There must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%".*

44. In determining whether or not the effect of disclosure in this case would, or would be likely to, be detrimental or damaging in some way to the commercial interests of the Council, the Commissioner has considered the nature and likelihood of harm that would be likely to be caused.
45. From the evidence she has seen, the Commissioner is satisfied that there is a more than a hypothetical risk of prejudice occurring to the Council if the withheld information was disclosed; rather the risk of such prejudice occurring can be correctly described as one that is real and significant, although she is not convinced that the risk of the prejudice occurring is more probable than not.
46. Accordingly, the Commissioner considers that the lower threshold of prejudice applies, rather than the higher threshold as initially stated by the council.
47. The Commissioner has therefore concluded the section 43(2) exemption is engaged in respect of the commercial interests of the Council.

*The public interest test*

48. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*Public interest arguments in favour of disclosing the information*

49. In favour of disclosure in this case, the complainant considered that the public has *"an overwhelming interest"* to know how the investments were financed:

*"... especially at a time when local government is under unprecedented financial strain".*

50. The Council recognised the general public interest in the way the Council manages its residents' money.

*Public interest arguments in favour of maintaining the exemption*

51. Arguing in favour of maintaining the exemption, the Council was of the view that:

*"Disclosure would reduce the spend the Council has (commercial interests), which would directly impact the services we are able to provide to our residents*

*Disclosure of information would negatively impact the Councils reputation due to loss of investor/lender confidence in the Council".*

52. In support of its view, the Council told both the complainant and the Commissioner:

*"The Council has a duty to its residents to obtain the best loan opportunities to maximise its available spend and/or budget. If it were to release the details related to the rates paid or charged, then this directly effects our short and long term borrowing position. Rates on borrowing could increase and the rates the Council charge could reduce. This will impact negatively on the Council's available budget and in-turn will impact the services we provide to our residents".*

*The balance of the public interest*

53. The issue for the Commissioner to decide is whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

54. In her guidance on the public interest test<sup>1</sup>, the Commissioner recognises that:

*"There will always be a general public interest in transparency. There may also be a public interest in transparency about the issue the information relates to".*

55. She also recognises that there is a public interest in releasing information to provide a full picture.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1183/the\\_public\\_interest\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf)

56. With regard to accountability for the spending of public money, she recognises in her guidance on section 43<sup>2</sup>:

*"If people have a better understanding of how public money is spent, this may give them more confidence in the integrity of the public authority and in its ability to effectively allocate public funds. Alternatively it may enable them to make more informed challenges to the spending of public money by public authorities".*

57. The Commissioner has taken into account the strong case for openness and transparency when balancing the public interest arguments in this case. Mindful of the amounts of money specified in the request, she gives weight to the argument that disclosure may help inform the public about how the Council is acting on their behalf with respect to inter-authority lending.
58. In that respect, the Commissioner acknowledges that the Council provided the complainant with some generic information about the subject matter of his request. She recognises that it provided him with details of the minimum and maximum length of the loans within the scope of the request, the range, in monetary terms, of the amounts typically involved, and the range of interest rates payable. She considers that goes some way to addressing the public interest.
59. In favour of maintaining the exemption, the Commissioner is mindful of the public interest inherent in this exemption, namely in avoiding harm to the commercial interests of any person.
60. She gives weight to the argument that disclosure of the information may cause unwarranted reputational damage to the Council, which may in turn damage its commercial interests, and ability to negotiate favourable terms for loans or investments, which in turn would impact the financial reserves of the Council and its ability to safeguard against cuts to services.
61. She recognises the legitimate public interest in the Council being able to compete in a commercial environment and that disclosure of the withheld information, which she has found would be likely to prejudice that ability to compete, would undermine that public interest. She considers it would not be in the public interest if the outcome was that

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

the resources available to the Council were reduced, thus impacting on the services it was able to provide to its residents.

62. On balance, the Commissioner considers that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption.

*Section 36*

63. The Council considered that both section 43 and section 36 applied to the withheld information.
64. As the Commissioner has found that the section 43 exemption applies, she has not considered the Council's application of section 36 to the same information.

## Right of appeal

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65. 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@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)

66. 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.

67. 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 .....**

**Laura Tomkinson**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Cheshire**  
**SK9 5AF**