

## 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 from Thurrock Council (the Council) regarding its investments in the renewable energy sector.
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 December 2019, the complainant wrote to the Council and requested information in the following terms:

*"The authority's 2018/19 accounts state:*

*"The Council holds long term debtors of £740m as at 31 March 2019. £702m of the balance relates to long term capital investment in the renewable energy sector secured by the associated assets."*

*1) Can you provide a breakdown of the individual investments that make up that £702 million figure, including for each:*

- A) The amount of money invested by the council*
- B) The date on which the investment took place*
- C) The recipient of the money*
- D) The type of investment (bond, stock, mutual fund, etc)*
- E) The length of the investment*
- F) The name and location of the associated asset*
- G) Forecast gross and net returns across the investment period*
- H) The name of the broker (or any equivalent entity) which notified the authority about the investment opportunity*
- I) How the investment was financed (short-term borrowing from local authorities, PWLB, reserves, etc)*

*2) As of 02/12/2019, what is the total of:*

- A) The council's long term debtors*
- B) The long term capital investment in renewable energy sector*

*3) For all investments not included in the answer to question one (i.e. all made since 31 March 2019 to 02/12/2019) please provide the following information:*

- A) The amount of money invested by the council*
- B) The date on which the investment took place*
- C) The recipient of the money*
- D) The type of investment (bond, stock, mutual fund, etc)*
- E) The length of the investment*
- F) The name and location of the associated asset*
- G) Forecast gross and net returns across the investment period*

*H) The name of the broker (or any equivalent entity) which notified the authority about the investment opportunity*

*I) How the investment was financed (short-term borrowing from local authorities, PWLB, reserves, etc)"*

6. The Council responded on 8 January 2020. It provided some generic information about its investments in renewable energy – namely a high level breakdown of how the £702 million is invested - but refused to provide the specific information within the scope of the request. It cited section 43(2) (commercial interests) of the FOIA as its basis for doing so.
7. Following an internal review, the Council wrote to the complainant on 5 February 2020. It revised its position, additionally citing section 36 (prejudice to effective conduct of public affairs) of the FOIA.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 12 February 2020 to complain about the way his request for information had been handled.
9. He told the Commissioner:

*"Thurrock council borrowed £702 million from other local authorities and invested it in the renewable energy sector... It is unprecedented for a council to have borrowed so much from other authorities and then invested those funds, only to refuse to tell people what they have invested in".*
10. The Commissioner acknowledges that the complainant told her both that the '*Statutory Guidance on Local Government Investments*' state investments by councils should be transparent and open to public scrutiny, and also that other public bodies have raised concerns about such matters. However, her duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of the FOIA.
11. During the course of the Commissioner's investigation, the Council confirmed its view that the requested information should be withheld by virtue of sections 43(2) and 36(2)(b) and (c) of the FOIA.
12. The analysis below considers the Council's application of section 43(2) to that information.

## Reasons for decision

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### *Section 43 Commercial interests*

13. 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).'*

14. 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.
- 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.

15. In relation to the lower threshold 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, in the Commissioner's view this places a stronger evidential burden on the public authority.

### *The complainant's view*

16. In his correspondence with the Council, in which he disputed its application of section 43, the complainant said:

*"... If the council was serious about this exemption it could have, for example, withheld the recipients of the money instead of issuing a blanket refusal. While I believe all the information should be disclosed, refusing all of it is even more unjustified".*

17. The complainant disputed that disclosure of the requested information would mean that other companies would not want to work with the Council. In support of his view he said:

*"This risk is purely hypothetical. The council makes no attempt to explain why it believes that companies knowing which other businesses the council has invested in, on what dates, the amount of money involved, etc, would result in them not wanting to invest. Unless, of course, there was something questionable about the investments the council has made. If so, that would only increase the public interest in knowing the information I have requested".*

18. In his correspondence with the Council, the complainant referred to details of payments that had been published. He also stated:

*"Furthermore, press releases and council reports are not the only way the council has already published - without harm - the sort of information I requested".*

19. Similarly, he told the Commissioner:

*"... the council did publicise details of its first investment on numerous platforms. Presumably it did so without concern that it would prejudice its interests or put off other investors. Yet it now argues the same details of other deals cannot be released."*

#### *The Council's view*

20. The Commissioner considers that the Council relied on the requested information being self-evidently exempt when it told the complainant:

*"The council are of the view that the release of the information in scope of [your] request would prejudice its own commercial interests and the commercial interests of the other parties involved".*

21. With respect to prejudice to its own commercial interests, the Council variously told the complainant, albeit in respect of the public interest test, that disclosure:

*"... would negatively impact the councils working relationships with its lenders.";*

and

*"... would negatively impact the councils reputation due to loss of investor confidence in the council".*

22. With respect to the detrimental impact on the commercial interests of the other parties involved, the Council explained to the complainant that disclosure:

*"... would publically detail commercially sensitive information".*

23. It argued that this would damage their competitive position.
24. In that respect, in its internal correspondence, the Council told the complainant:

*"The Council have however sought confirmation from another party involved and they have confirmed they are in agreement with its view on this matter".*
25. The Council provided the Commissioner with details of that third party confirmation.
26. During the course of the Commissioner's investigation, the Council provided further evidence in support of its view that its own interests would be damaged by disclosure of the requested information.
27. With reference to the complainant's observation that the Council had previously publicised details of a relevant investment, it explained the apparent difference in approach taken by the Council in this case. In its submission to the Commissioner, it acknowledged that while information about its involvement in a previous investment of this type had been in the public domain, this was no longer its practice.

#### *The Commissioner's view*

28. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered her guidance on the application of section 43<sup>1</sup>. This states that:

*"A commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent".*

29. Her guidance also explains:

*"In order for such information to be exempt, the public authority must show that because it is commercially sensitive, disclosure would be, or would be likely to be, prejudicial to the commercial*

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

*activities of a person (an individual, a company, the public authority itself or any other legal entity)".*

#### *The applicable interests*

30. 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.
31. 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 – capital investment – is conducted in a competitive environment.
32. 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 relates to the interests which the exemption contained at section 43(2) is designed to protect.

#### *Nature of the prejudice*

33. 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(2). 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.
34. 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
35. 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.
36. 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.
37. The Commissioner recognises that there will be situations where a public authority cannot seek the views of a third party, for example due to

time constraints for responding to requests. In those circumstances, her guidance states:

*"... the public authority may present arguments regarding the likelihood of prejudice based on its prior knowledge of the third party's concerns. In doing so, a public authority will need to provide evidence that its arguments genuinely reflect the concerns of the third party involved".*

38. While the Commissioner is satisfied that the Council confirmed that it had consulted with one of the third parties involved, she is not satisfied that the Council demonstrated that it had consulted with all the relevant third parties in order to establish whether they had any objection to their information being disclosed.
39. She accepts that the Council provided her with evidence that reflects the concerns of the third party that was consulted in relation to this request for information. She also acknowledges that that third party did not consent to the disclosure of any commercial information. However, she is not satisfied that it was clear what prejudice they would suffer as a result of disclosure.
40. Where there are concerns about the impact of disclosure on third party interests, the Commissioner considers that 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.
41. In this case, she does not consider that the Council has discharged this burden satisfactorily with respect to the third parties concerned.
42. 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.
43. 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.
44. During the course of the Commissioner's investigation, the Council provided evidence in support of its view that its own interests would be damaged by disclosure of the requested information.
45. 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 seek investment deals in the future. 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 investment.

*The likelihood of prejudice*

46. 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.

47. 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%".*

48. 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.

49. 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.

50. Accordingly, the Commissioner considers that the lower threshold, rather than the higher threshold, of prejudice applies, rather than the higher threshold as initially stated by the council.

51. The Commissioner has therefore concluded the section 43(2) exemption is engaged in respect of prejudice to the commercial interests of the Council.

*The public interest test*

52. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the

public interest in maintaining that exemption outweighs the public interest in disclosure.

53. When dealing with a complaint that information has been wrongly withheld, in accordance with her guidance on the public interest test<sup>2</sup>, the Commissioner will consider the situation at the time at which the public authority originally dealt with the request, or the time of the authority's internal review.

*Public interest arguments in favour of disclosure*

54. The Council recognised that disclosure in this case:

*".. would inform the public of the activities carried out on their behalf and to scrutinise public monies spent [sic]"*.

55. In favour of disclosure, the complainant told the Council:

*"I believe there is a strong public interest in this information being released given the sums of money involved and the lack of publicly available information about the council's investments. The council has publicised the benefits of its investment policy but the public is currently unable to properly scrutinise how this money has been spent"*.

56. He also said:

*"There is also the question of protecting the public, as detailed by the ICO guidance on Section 42 [sic] (par 48). There is good reason to question the practices of at least one of the companies the council has invested tens of millions of pounds in. There is a strong public interest argument in allowing access to the information I have requested in order to protect the public (both in Thurrock and those areas where the council has borrowed) from unsafe or dubious practices"*.

57. With regard to that argument in favour of disclosure, the Commissioner considers that the complainant was actually referring to paragraph 48 of

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<sup>2</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)

her guidance on the section 43 exemption. She is mindful that the full wording of that paragraph states:

*"Protection of the public – if a public authority is a regulator, it may hold commercially sensitive information about the quality of a product or the practices of an organisation. There are strong public interest arguments in allowing access to information which will help protect the public from unsafe products or dubious practices. This would potentially override any considerations of prejudice to the commercial interests of a company".*

58. She does not consider that those are the circumstances here as there is no evidence that the Council is acting as a regulator in this case.
59. While the complainant maintained that it was in the public interest that all of the information should be disclosed, in his correspondence with the Commissioner he acknowledged that:

*"... key information required to properly scrutinise the spending of £702 million of public funds is to know which companies/schemes were invested in".*

#### *Public interest arguments in favour of maintaining the exemption*

60. In favour of maintaining the exemption, the Council told the complainant:

*"Disclosure of information would result in other companies that offer similar investments not wanting to work with the council due to commercially sensitive information being released by the Council with regards to prior investments. This will have a negative impact on the council's ability to seek suitable investment deals going forward".*

61. It also considered that disclosure of the requested information would negatively impact the Council's working relationships with its lenders, which:

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

62. It also considered that disclosure of the requested information would negatively impact the Council's reputation due to loss of investor confidence in the Council.

63. The Council told the complainant:

*"All the time the council are able to maximise its funds in this way and maintain its service provision, there is no strong public interest in favour of disclosure of this level of detail".*

*Balance of the public interest arguments*

64. 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.

65. The Commissioner considers that there will always be some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.

66. With regard to accountability for the spending of public money, she recognises in her guidance on section 43:

*"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".*

67. The Commissioner has taken into account the case for openness and transparency when balancing the public interest arguments in this case. Mindful of the amount 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 its investments in renewable energy.

68. Weighed against the above are the detrimental effects that disclosure of the requested information would have on the commercial interests which the Council has identified.

69. The Commissioner is mindful of the public interest inherent in this exemption, namely in avoiding harm to the commercial interests of any person. Accordingly, she gives weight to the argument that disclosure of the requested information, including partial disclosure of the companies/schemes invested in, as suggested to her by the complainant, will have a negative impact on the Council's ability to seek suitable investment deals in the future.

70. Furthermore, in the Commissioner's opinion, there is clear public interest in ensuring the Council maximises its funds and maintains its service provision.
71. She gives weight to the argument that disclosure of the information may cause reputational damage to the Council, which may in turn damage its ability to invest on favourable terms.
72. In the circumstances of this case the Commissioner considers this argument to attract significant weight given that disclosure of the information presents a real risk of harming the Council's commercial interests with regard to its investment/borrowing opportunities and, moreover, risks undermining the services it is able to provide to its residents.
73. 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 prejudice to effective conduct of public affairs*

74. The Council considered that both section 43 and section 36 applied to the withheld information.
75. 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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76. 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)

77. 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.

78. 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  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**