

Decision Notice 050/2020

LOBO Loan Borrowing

Applicant: The Applicant

Public authority: Aberdeen City Council

Case Ref: 201900993



Scottish Information
Commissioner

Summary

The Council was asked for information regarding its Lender Option Borrower Option (LOBO) loan borrowing.

The Council refused to disclose certain of the information which would fulfil the request as it considered this would prejudice its commercial interests, and those of the lenders, substantially.

The Commissioner investigated and found that the Council was not entitled to withhold the information on these grounds and required the Council to disclose it. The Commissioner also found that the Council should have disclosed information at review stage where it was no longer seeking to rely on the exemption.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 13 February 2019, the Applicant made a request for information to Aberdeen City Council (the Council) and asked that it be provided in Microsoft XL format. The information requested was:
 - a) How much of the Council's LOBO loan debt has been repaid and refinanced? Please list the LOBO loans that have been refinanced by counterparty, notional amount, original maturity and date of restructuring.
 - b) Please disclose the break cost paid to the bank counterparty for each loan restructuring and the discount rate used in each valuation.
 - c) Please disclose any additional PWLB borrowing undertaken to finance LOBO loan restructuring, including the maturities and coupon rates of new PWLB loans.
 - d) Please disclose the name of any third-party adviser used on the restructuring.
 - e) Please provide original, modified, and/or restructured loan contracts, including:
 - i) LOBOs converted into fixed rate loans
 - ii) LOBOs/fixed rate loans converted into PWLB loans
 - iii) LOBOS that have not been refinanced.
 - f) Please provide the name of the broker used for each loan restructuring, and the relevant brokerage fee paid.
 - g) Please confirm whether the Council has applied any "statutory overrides" or "capitalisation requests" in relation to the accounting for LOBO loans in the Council's annual accounts. Please provide the:
 - i) Date/year

- ii) Subject/scope of each override
 - iii) Result of each formal application for a statutory override.
2. The Council sought clarification from the Applicant on 15 February 2019 as to what he meant by "PWLB" at part c) of his request.
 3. The Applicant provided a response to this request for clarification on 15 February 2019 explaining that "PWLB" meant "Public Works Loan Board".
 4. The Council responded on 8 March 2019. It provided a response to all parts of the Applicant's request other than part e). The Council applied the exemption in section 33(1)(b) of FOISA (Commercial interests and the economy) to information which would fulfil part e), as it considered disclosure would prejudice substantially its own commercial interests, together with those of the lenders.
 5. Later that day, the Applicant wrote to the Council requesting a review of its decision regarding the original LOBO loan contracts. The Applicant made reference to four decision notices issued by the UK Information Commissioner Office (the ICO) which related to requests for similar information from Councils in Swansea, Cornwall, Kingston Upon-Thames and Solihull. The Applicant specifically referred to the public interest test arguments considered by the ICO in the decision notice for Cornwall Council, where the Council was relying on the exemption in section 43(2) (Commercial interests) of the Freedom of Information Act 2000 (FOIA) (and the ICO found that the public interest favoured disclosure).
 6. The Applicant indicated that, unless the Council could offer a more robust public interest argument than the Councils against whom the ICO had issued Decision Notices requiring disclosure, it should lift the application of the exemption and provide the information he requested. The Applicant also pointed out that the majority of Council across the UK had provided the full, unredacted LOBO loan contracts.
 7. The Council notified the Applicant of the outcome of its review on 26 March 2019. In its response, the Council upheld its reliance on the exemption in section 33(1)(b) of FOISA. It did note that, in terms of section 15 of FOISA, it could provide additional information to the Applicant and signposted him to current budget information, including information on market loans, contained in a report for the Council budget meeting on Tuesday 5 March 2019. A link was provided to the Applicant to facilitate him in accessing this information on the Council's website.
 8. On 17 June 2019, the Applicant wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Council's review because the Council was withholding information from him when he believed disclosure was in the public interest. He asserted that this was information which deserved transparency as it involved the Council's decisions to undertake millions in loans: he claimed the vast majority of Scotland's councils had so far granted him the information outright, or after an internal review.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
10. On 23 July 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from the Applicant. The Council provided the information and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These related to the Council's application of the exemption in section 33(1)(b) (Commercial interests and the economy) of FOISA. Clarification was also sought from the Council regarding some of the withheld information.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.
13. The subject matter of this investigation relates to a request for contracts for LOBO loans. LOBO loans are Lender Option Borrower Option Loans which are typically long term, lasting from 30 to 70 years. The uptake of these loans by local authorities was common in the early 2000s, as a means of covering funding gaps. The loans can vary in value from £500,000 to £16 million and are arranged for Councils by a broker. The interest rate for each loan is set at one level to start with and the agreement usually contains an option for the lender to vary the interest rate periodically. Should the lender decide to increase the interest rate, the borrower (the Council) has the option to either accept that increase or repay the loan in full. It is also possible that the lender or counterparty associated with the loan will change, as other financial institutions can buy up these loans on the open market.

Was all relevant information identified, located and provided by the Council?

14. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to certain qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.
15. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information the authority should hold.
16. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.

17. In its submissions to the Commissioner, the Council explained that it holds loan documentation in a secure safe and this documentation was checked against a manual loan register to ensure that all recent documents were looked into and provided when replying to the Applicant or sending them to the Commissioner. The Council advised that it also holds details of its LOBO loans on an electronic system, but this data was not searched as part of the process of responding to the FOI request.
18. During the course of the investigation, the Council was asked to carry out searches of the recorded information held in its electronic system to establish whether any other recorded information was held which would fall within scope of part e) of the Applicant's request.
19. Having carried out these searches, the Council explained that, as the loans have a financial value, they are recorded in its electronic loans system, but this system contains only limited information. The Council advised that no additional information is held in the electronic records to that already searched and provided in relation to the Applicant's request. A screenshot of the records held in the electronic system was provided by the Council.
20. Having considered all of the submissions from the Council, the Commissioner accepts that the Council carried out adequate, proportionate searches of all areas where recorded information, falling within scope of part e) of the request, would be held. The Commissioner is satisfied that no additional recorded information was identified as a result of the further searches during the investigation and all relevant, recorded information held by the Council was identified and provided either to the Applicant or to the Commissioner as part of this investigation.

Handling of request

21. In its submissions to the Commissioner, the Council explained that it applied the exemption in section 33(1)(b) of FOISA to the information covered by part e) of the Applicant's request, when it provided its response. This position was, the Council submitted, upheld at the review stage.
22. However, when responding to a request made by the Applicant for similar information on 1 April 2019, the Council disclosed further information in relation to the LOBO loans and only relied on the exemption in section 33(1)(b) for the interest rates associated with each LOBO loan. The Council submitted that it provided this information in an effort to be transparent and accountable and to comply with section 15 of FOISA.
23. Whilst the Commissioner notes the action taken by the Council in relation to the response to the Applicant's request of 1 April 2019, as made clear in the Court of Session decision in *The Scottish Ministers v The Scottish Information Commissioner* [2006] CSIH 8¹, the Commissioner's investigation in this case must consider the circumstances applying to the information at the time of the response to the requirement for review (26 March 2019).
24. At the time of the requirement for review, the Council was relying on section 33(1)(b) for withholding all the information covered by part e) of the request. In its submissions to the Commissioner during the investigation, the Council explained that it was now relying on section 33(1)(b) for interest rates and terms and conditions for certain contracts only. In the

¹ <http://www.scotcourts.gov.uk/search-judgments/judgment?id=a94886a6-8980-69d2-b500-ff000d74aa7>

absence of submissions supporting the withholding of anything else, the Commissioner finds that the Council should have disclosed the information in the contracts, apart from the information it is still seeking to withhold, when responding to the requirement for review. By not doing so, the Commissioner finds that the Council failed to comply with section 1(1) of FOISA.

25. As this information has now been disclosed to the Applicant (in response to the later request) the Commissioner does not require it to be disclosed again.
26. The Commissioner's investigation, in this case, will focus on the Council's application of the exemption in section 33(1)(b) of FOISA to the interest rates and the terms and conditions relating to certain contracts.

Section 33(1)(b) – Commercial interests and the economy

27. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
28. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - (i) whose commercial interests would (or would be likely to) be harmed by disclosure,
 - (ii) the nature of those commercial interests and
 - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
29. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers that the commercial interests of a third party would (or would be likely to) be harmed, it must make this clear. Generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
30. In its submissions, the Council explained that it is seeking to rely on the exemption in section 33(1)(b) for the interest rates associated with each LOBO loan, as well as the terms and conditions relating to certain contracts
31. The Council explained it was its own commercial interests it is seeking to protect by withholding the interest rates. It was also seeking to protect the commercial interests of the lenders by withholding the terms and conditions contained in certain contracts. The Council has not specified which particular contracts these are, nor has it highlighted the terms and conditions it is concerned about disclosing.
32. In terms of the harm it believed would be caused to its own commercial interests by disclosure, the Council explained that, due to the tradeable nature of these loans between banks, and the fact that lenders could request interest rate rises, it was seeking to protect its position against potential higher interest rate costs and the potential risks associated with refinancing (if, for example, it was forced to take out alternative loans when rates in the market were high). Disclosure of the interest rates and terms and conditions would, the Council believed, put it at a competitive disadvantage dealing with other lenders, which could result in higher interest rates and increased costs. In the Council's view, disclosure of the interest rate associated with these LOBO loans would enable lenders to know what level of

interest the Council was willing to agree to and they, in turn, would adjust their rates accordingly. The Council also submitted that lenders might use the opportunity to buy up the LOBO loans and issue a blanket request to adjust the interest rates.

33. With regard to the commercial interests of the lenders, the Council believed disclosure of the terms and conditions in relation to certain contracts might prejudice the future position of the relevant organisations, particularly when they were negotiating contracts with other public-sector authorities.
34. The Commissioner is satisfied that both the Council and the Lenders have commercial interests in relation to the LOBO loan contracts.
35. Having considered the nature of LOBO loans, it is clear that an intrinsic part of the mechanism for LOBO loans is the option for lenders to periodically consider whether they wish to adjust the interest rate associated with it, and for the borrower (the Council) to decide whether they wish to accept this adjustment or pay the balance of the loan back in full. However, the Commissioner cannot accept that disclosure of the interest rates associated with the loans currently held by the Council would, or would be likely to, prejudice its commercial interests substantially.
36. The Commissioner does not accept that disclosure of the interest rates associated with the current loans would have a direct bearing on the amount of interest a lender would seek to charge for a particular loan in future. The rate of interest contained in the current contracts is a reflection of what the Council was prepared to accept at a particular time and in particular circumstances, and also of what the lender was prepared to offer in the market prevailing at that time. Whether the lender decides to increase the interest rate will depend on whether it is at a point at which the rate can be reviewed, and also the prevailing market conditions at that time.
37. Furthermore, it is clear that the Council uses a broker to arrange the LOBO loan(s). It would be for the broker to ensure that they got the best deal for the Council should it be seeking further borrowing, for whatever reason, and this would be likely to involve contacting more than one lender. The Commissioner is also aware that there are around 32 different lenders operating in the LOBO loan market, so this is in no way a closed or restricted market and there will be choices available to the Council.
38. The Commissioner acknowledges that the opportunity to “buy up” the LOBO loans held by a public authority exists, as a consequence of the tradeable nature of these loans. In the absence of more specific submissions about how this harm would occur, however, the Commissioner is unable to accept that disclosure of the interest rates in this case would necessarily affect the likelihood of these loans being “bought up”.
39. Whilst the Commissioner can accept that some harm may be caused to the Council’s commercial interests as a consequence of disclosure, therefore, he does not agree – on the basis of the submissions he has been offered – that this is at a level of substantial prejudice.
40. In terms of the potential harm that might be caused to lenders as a consequence of disclosing terms and conditions in certain contracts, the Council has not highlighted which contracts it is referring to. Nor has it explained which terms and conditions it is particularly concerned about. Having considered the terms and conditions in the LOBO loan contracts held by the Council, it is clear that the content of all of them is very similar and comprises fairly standard information and conditions which would be expected in contracts of this kind. In the absence of more specific submissions from the Council, the Commissioner is unable to

accept that it has provided sufficient evidence to justify that disclosure (of such terms and conditions or any other withheld information) would, or would be likely to, prejudice substantially the commercial interests of the lenders.

41. Consequently, given the information under consideration and the submissions he has received, the Commissioner does not accept that disclosure of the information withheld from the Applicant would, or would be likely to, have prejudiced substantially the Council's commercial interests or those of the lenders. He therefore concludes that the Council was not entitled to apply the exemption in section 33(1)(b) of FOISA in this case.
42. However, were the Commissioner to accept that substantial prejudice would be caused to the Commercial interests of the Council and lenders he would be required to go on to consider the public interest in terms of section 2(1)(b) of FOISA. For completeness, the Commissioner will consider this in this case.

Section 2(1)(b) – Public interest test

43. Consideration of the public interest test requires the Commissioner to consider whether, in all the circumstances of the case, the public interest in disclosing the withheld information is outweighed by the public interest in maintaining the exemption in section 33(1)(b).

Applicant's comments on the public interest

44. The Applicant believes that disclosure of the interest rates is in the public interest and notes that this has been acknowledged by the vast majority of Scottish councils through their disclosure of the original LOBO loan contracts. The Applicant appreciates that commercial interests must be protected, but notes that the information in question relates to decisions around public finances that affect each and every person in Scotland.
45. It is the Applicant's view that these LOBO loans and related debt and repayment agreements will influence public spending for years to come, and so taxpayers have the right to know the full terms of such significant financial agreements between local authorities and financial institutions.
46. The Applicant considers that the only way for the public to scrutinise such decisions in their entirety is for this information to be released. Where these LOBO loans have been taken out by a public authority, the Applicant believes that the public interest outweighs any public interest held by the Council.
47. Rather than harming competition, the Applicant is of the view that making such information surrounding historical financial decisions transparent will allow both lenders and local authorities to make and secure more favourable borrowing rates and conditions in future. The Applicant notes that with these contracts totalling hundreds of millions of pounds nationwide, the impacts of such decisions on taxpayers, particularly at a time of austerity, are massive.

The Council's comments on the public interest

48. The Council acknowledges the public interest in the concern that some Councils hold LOBO loans at high rates or linked to indexes which can fluctuate. However, it does not believe disclosure of the interest rates and terms and conditions associated with these loans would contribute to ensuring either effective oversight of the expenditure of public funds or that the public obtain value for money for public funds. The Council argues that the information it has already made available in relation to these contracts, along with the monitoring mechanisms

in place, satisfy the public interest in ensuring value for money and the mitigation of foreseeable financial risk.

49. The Council also submits that revealing the fine print of these agreements, including the terms and interest rates, would put it in a position of unnecessary additional risk. The Council anticipates that this risk would arise from requests for increases to the rates of these LOBO loans following the publication of this information. This would, in the Council's view, be contrary to the public interest.
50. The Council has explained that these loans were approved by the Chief Officer – Finance and reported to full Council. In addition, it has explained they are regularly monitored by the Treasury Officer and reported to full Council. The Council believes it takes a very serious approach to ensuring that appropriate scrutiny mechanisms are fully implemented into all aspects of financial management. Overall, the Council considered that the necessity of protecting its interests in retaining the agreement at its current state outweighs the public interest in the disclosure of the information.

Commissioner's conclusions on the public interest

51. The Commissioner has considered all of the arguments and facts in this case. The Commissioner acknowledges the general public interest in transparency and accountability, particularly in relation to the spending of public funds and notes that the information disclosed to the Applicant, by the Council, in response to his later request goes some way towards this.
52. Nevertheless, it is clear that, without disclosure of the interest rate(s) and terms and conditions associated with the LOBO loan agreements held by the Council, it is not possible for the public to have a true picture of the financial commitment made by the Council and the cost to the public purse in the longer term, together with the conditions attached to that commitment. As mentioned previously, LOBO loans are long term loans which will continue to cost the Council (public purse) money in terms of interest repayments for some considerable time. Given the limited funds the Council has available to it, and the competing priorities it must balance, it is more important than ever that value for money is obtained and the public is able to follow the public pound and be assured that it is well spent.
53. The Commissioner notes the Council's view that its own internal monitoring and reporting mechanisms ensures that value for money is obtained but, whilst this will be reassuring to the public, it is also in the public interest that the public is able to scrutinise, independently, the long term commitments made for such large sums of money (particularly as this is likely to have an impact on the finances available to the Council to fund other local functions and services).
54. The subject of local authorities using LOBO loans to cover funding gaps and whether these provide value for money is a matter which is of significant public interest. This is evidenced by the investigation started by the (UK) Parliamentary Select Committee on Communities and Local Government, together with the call by MPs for an investigation to be carried out by the Financial Conduct Authority. The significant public interest in these loans is also clear from the portal which has been set up by Debt Resistance UK, which gives access to details of LOBO loans held by a number of local authorities throughout the UK, including this one.
55. In its public interest test arguments, the Council has focused on the harm to its own commercial interests by disclosure, where it anticipates that requests will be made to it for increases to the rates of the LOBO loans it holds, thereby increasing its borrowing costs. As

the Commissioner has already outlined his reasons for finding that this substantial prejudice would not be caused (and would not be likely to be caused) by disclosure, he does not accept that this is an argument which can be given much weight in assessing the public interest for and against disclosure of this particular information.

56. Having balanced the public interest for and against disclosure, therefore, the Commissioner has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption in section 33(1)(b) (had he found it to apply) would not outweigh that in disclosure of the information under consideration.
57. The Commissioner therefore finds that the Council was not entitled to withhold the information under section 33(1)(b) of FOISA. He must require that it be disclosed.

Decision

The Commissioner finds that Aberdeen City Council (the Council) failed to comply with Part 1 (and, in particular, section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that the Council was not entitled to rely on the exemption in section 33(1)(b) of FOISA to withhold the interest rates and terms and conditions associated with each LOBO loan contract it holds. The Commissioner also finds that the Council breached section 1(1) of FOISA in not disclosing further information to the Applicant (disclosed in response to the later request) at review stage in this case.

The Commissioner therefore requires the Council to disclose the interest rates and terms and conditions associated with each of the LOBO loans it holds, by **30 April 2020**.

Given that the Council disclosed the further information (not including the interest rate and terms and conditions) in response to a later request from the Applicant, the Commissioner does not require the Council to take any action in response to its failure to comply regarding that information, in response to the Applicant's application.

Appeal

Should either the Applicant or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

16 March 2020

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

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