

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 December 2015

Public Authority: City and County of Swansea
Address: Civic Centre
Oystermouth Road
Swansea
SA1 3SN

Decision (including any steps ordered)

1. The complainant requested information about Lender Option Borrower Option (LOBO) contracts. The City and County of Swansea disclosed some information but withheld copies of the contracts under section 43(2) of the FOIA.
2. The Commissioner's decision is that the exemption as set out in section 43(2) of the FOIA is not engaged in relation to the withheld information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
 - To disclose the withheld information to the complainant
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 7 March 2015 the complainant wrote to the Council and requested information in the following terms:

- “1. How many Lender Option Borrower Option (LOBOs) contracts do you have on your books?
 2. When were they signed and by whom?
 3. With which financial institutions were they taken out?
 4. Who advised the council to enter the LOBO(s)?
 5. Since each Contract has been signed, has the lender exercised their option and changed their interest rate?
 6. If so, please specify the dates of the interest rate changes and the revised interest rates.
 7. Please provide a copy of the original, signed LOBO agreements”.
6. The Council responded on 13 April 2015 and provided the information requested in parts 1-6 of the request. However, the Council stated that it was “not appropriate” to disclose copies of the signed LOBO agreements (part 7 of the request).
 7. On 21 April Mr Griffiths requested an internal review of the Council’s handling of part 7 of the request as it had not provided details of any exemptions considered applicable to the request.
 8. The Council provided the outcome of its internal review on 15 June 2015. It acknowledged that its response to part 7 of the request was not in accordance with the FOIA. The Council stated that it considered the information held relevant to part 7 of the request to be exempt under section 43 of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 18 June 2015 to complain about the way his request for information had been handled.
10. The scope of the Commissioner’s investigation into this complaint is to determine whether the Council should disclose the information held relating to part 7 of the request or whether it was correct in relying on section 43 of the FOIA.

Reasons for decision

Section 43 – commercial interests

11. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
12. Broadly speaking, section 43(2) protects the ability of a party to participate competitively in a commercial activity, for example the purchase and sale of goods or services. The successful application of section 43(2) is dependent on a public authority being able to demonstrate that the following conditions are satisfied –
 - Disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it).
 - In all the circumstances, the weight of the public interest in maintaining the exemption outweighs the public interest in disclosure.
13. The Council has applied section 43(2) to 10 LOBO agreements it has in place with a number of different organisations. Prior to the Commissioner's involvement, the Council provided no specific arguments as to why it considered section 43 to apply other than to state in its internal review response that:

“This information is considered to be commercially sensitive and as such is not being released in accordance with the exemption specified in Section 43 FOI Act.

This exemption applies where the release of the information is likely to prejudice the commercial interest of any person. (A person may be an individual, a company, the public authority itself or any other legal entity)”.
14. In light of the limited representations, the Commissioner wrote a detailed letter to the Council asking it to fully explain why it considered section 43 to apply. The Council was asked to identify the party or parties whose commercial interests would, or would be likely to be prejudiced if the 10 LOBO agreements were to be disclosed; to provide a detailed explanation to support the position that disclosure of the information would, or would likely, prejudice those parties commercial interests; and to provide him with evidence which demonstrates a clear link between the potential disclosure of the information and the prejudice to commercial interests which the Council had identified. The

Commissioner also asked the Council to provide full details of its public interest test considerations.

15. The Council chose not to provide specific answers to the Commissioner's questions. Rather, the Council advised the Commissioner that it had sought the view of all the lenders concerned and that all but one of them had objected to disclosure of the information. However, despite requesting the evidence of the views of all the lenders concerned, the Council only provided the Commissioner with the views it received from one of them. The Council acknowledged that, regardless of the views of any third party, the decision as to whether the information requested should be disclosed rested with the Council itself. However, the Council did not submit any specific representations to the Commissioner in terms of the engagement of section 43, or its public interest arguments. Instead the Council simply stated that it had "taken into account the view of the third party lenders whilst assessing its position" and concluded that "on consideration of all the facts, the Authority is in agreement with the view of the lenders concerned and supports their arguments".

16. The views of one of the lenders are summarised below:

- Some of the information contained in the LOBO contract (namely the interest and the interest step-up option) is confidential and commercially sensitive. Disclosure would be prejudicial to the commercial interests of both the Council and the lender.
- There is a "real and significant risk" that disclosure would prejudice the lender's commercial interests as it could "create a false consumer expectation of the commercial term that [the lender] is able to offer, to the extent that [the lender] may not systematically be able to propose the same terms to its customers". The impact of such disclosure "could potentially" be harmful to the lender's business in the long term.
- Disclosure would enable the lender's competitors to take advantage of the situation to undercut its pricing. This would weaken its bargaining position during future financial and contractual negotiations with parties and cause "significant commercial harm" to its ability to compete. This would lead to a distortion of the market.
- Any decision by the Council to disclose the information despite the lender's objections "may potentially affect" the Council and the lender in any current and future negotiations and damage the ongoing relationship between the parties.

- The lender also stated that it considered section 41 of the FOIA to apply as the LOBO agreement “contains information given in confidence”.
17. Following consideration of the Council’s initial response to his enquiry, (which were based solely on one lender’s views on disclosure) the Commissioner wrote back to the Council to request further clarification about its position relating to the withheld information. Regrettably, despite being afforded the opportunity to expand on its rationale for applying section 43(2), the Council stated that:

“We intend to make no further submissions that those previously made and stand by the authority’s previous position. We would therefore ask that the ICO makes its decision based on these arguments”.
 18. The Council has not properly confirmed the likelihood of any specific prejudice to its own or any third party’s commercial interests. Likewise, the Council has not fully explained its specific arguments to support its view that the disclosure of the information requested, would or would be likely to prejudice its own or the lenders’ commercial interests.
 19. For its own commercial interests the Commissioner has considered the central question to be whether disclosure of the withheld information would be likely to be prejudicial to the Council as it would affect its future procurement and negotiating position. With regard to the lenders concerned the issue is whether disclosure would be likely to disadvantage their market position by revealing details of the specific rates charged. The Commissioner has considered the limited arguments put forward by the Council and one of the lenders to explain the perceived prejudice and to demonstrate any causal link between disclosure of the information and the prejudice that may occur to the Council and the lenders.
 20. The Commissioner understands that a LOBO loan is typically a very long-term loan – for example 40 to 70 years. The interest rate is initially fixed, but the lender has the “option” to propose or impose, on pre-determined future dates, such as every 5 years, a new fixed rate. If the lender exercises its option to impose a new interest rate, the borrower has the “option” to either accept the new rate or repay the entire loan. If the borrower chooses to repay the loan early it could incur significant exit fees.
 21. The Commissioner accepts that at the time the agreements were entered into, the Council and the lenders concerned may have had a stronger case for arguing that the withheld information would have been likely to have had a prejudicial effect on their commercial interests as it would have revealed information on the interest rates charged by the

lenders. This could have been used by competitors to gain an advantage when competing for similar agreements and impacted on the Council's ability to procure lending at best value for money in the future.

However, the Commissioner notes that the agreements were entered into between 2004 and 2008. The Council has failed to explain why the withheld information is still considered to be commercially sensitive, despite the passage of time, nor has the Council supplied any evidence to suggest that it is likely to be entering into any new LOBO agreements in the near future.

22. Before the section 43 exemption can be successfully engaged a public authority must be able to show that there is a causal link between disclosure of the information requested and the prejudice occurring. That is to say, it must be able to show how disclosure would, or would be likely to, cause the prejudice. Any argument must be more than just assertion or belief that disclosure would lead to prejudice. The public authority must be able to demonstrate that there is a logical connection between the disclosure and the prejudice.
23. In this case the Council has not supplied any cogent evidence to support the contention that disclosure of the requested information in this case would be likely to prejudice any party's commercial interest, beyond stating that it would. In situations where a public authority fails to explain why an exemption or exemptions apply the Commissioner does not consider it to be his role to generate explanations or arguments on the authority's behalf. As no further explanations for this position were offered the Commissioner can only conclude that the Council has failed to explain the causal link between the implied commercial prejudice, to its own interests and to the lenders interests, and the disclosure of the information. Put simply, in this case the Council's representations are limited and too 'generic'; they have failed to persuade the Commissioner that the section 43(2) exemption is properly engaged. Where the Commissioner finds that a prejudice-based exemption is not engaged, the Commissioner is not required to go on to consider the public interest.

Right of appeal

24. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

25. 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.
26. 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

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF