

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 November 2015

**Public Authority:** Cornwall Council  
**Address:** Cornwall Council  
County Hall  
Treyew Road  
Truro  
Cornwall  
TR1 3AY

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to Lender Option Borrowing Option loans. Cornwall Council disclosed some information and withheld other information under the exemptions for prejudice to commercial interests (section 43(2)) and information provided in confidence (section 41).
2. The Commissioner's decision is that Cornwall Council:
  - Correctly engaged the exemption under section 43(2) but that the public interest favours disclosing the withheld information and,
  - Failed to demonstrate that the exemption under section 41 is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the agreements specified in part 7 of the request.
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

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5. On 4 March 2015, the complainant wrote to Cornwall 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 the 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 agreement."*
6. The council responded on 31 March 2015. It disclosed some information and withheld other information under the exemption for prejudice to commercial interests (section 43(2) of the FOIA).
7. Following an internal review the council wrote to the complainant on 21 May 2015. It stated that it was maintaining its reliance on section 43(2) to withhold the agreements requested in part 7 of the request.

## Scope of the case

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8. On 6 August 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly applied section 43(2) of the FOIA to withhold the information requested in part 7 of the request.
10. During the course of the Commissioner's investigation the council confirmed that it also wished to rely on the exemption for information provided in confidence, section 41 of the FOIA, to withhold the requested information. The Commissioner has, therefore, considered whether this exemption has been correctly applied.

## Reasons for decision

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### Section 43(2) – prejudice to commercial interests

11. Section 43(2) provides an exemption from disclosure for information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.
12. The withheld information consists of a number of agreements between the council (the borrower) and banks (the lender).
13. “Commercial interests” in the context of this exemption can include a wide variety of activities. In this case, the withheld information relates to the provision of a service by banks to the council, namely the provision of monetary loans. The Commissioner is, therefore, satisfied that the information falls within the scope of the exemption.
14. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice would or would be likely to be caused to one or more parties.
15. The ICO has been guided on the interpretation of the phrase ‘would, or would be likely to’ by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice ‘would’ occur or prejudice ‘would be likely to’ occur.
16. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that ‘the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk’ (Tribunal at paragraph 15).
17. With regard to the alternative limb of ‘would prejudice’, the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that ‘clearly this second limb of the test places a stronger evidential burden on the public authority to discharge’ (Tribunal at paragraph 36).
18. In this instance the council has argued that disclosure could or is likely to prejudice the commercial interests of both the lenders and the council. The Commissioner has, therefore, considered whether the likelihood of the prejudice identified by the council is more than an hypothetical possibility.

*The nature of the prejudice*

19. The Commissioner has first considered the putative prejudice to the lenders which the council has argued would result from disclosure.
20. The Commissioner notes that, in accordance with the recommendations of the code of practice issued under section 45 of the FOIA, the council approached and sought the views of the lenders party to the LOBO agreements. He has, therefore considered the submissions provided by these third parties alongside those provided by the council.
21. Firstly, it is argued that disclosure of the agreements would enable competitors to "take advantage" of the situation to undercut the lenders' pricing, weakening their bargaining position during future financial and contractual negotiations with counterparties.
22. The council, via the lenders, has also argued that disclosure of the information could create a false consumer expectation of the commercial terms the lenders are able to offer, meaning that the lenders may not systematically be able to propose the same terms to its customers. It is argued that the impact of disclosure would be to harm their ability to conduct LOBOs in the future and result in a distorting of the market.
23. In relation to the possibility of harm to its own interests, the council has argued that disclosure would prejudice its working relationship with the various lenders and prohibit it from entering such agreements at a favourable rate. In presenting this argument the council has pointed to submissions from one of the lenders which confirms that disclosure would potentially affect current and future negotiations with the council and harm the ongoing commercial relationship.
24. The Commissioner notes that the arguments provided are somewhat generic in nature, describing scenarios which are potentially transferable to a number of commercial relationships and scenarios. However, having considered the relevant facts, he accepts that disclosure of the information would be likely to result in some harm to the commercial interests identified. As he has concluded that the exemption is, therefore, engaged he has gone on to consider the public interest test as it relates to both the council's and the lenders' commercial interests.

*Public interest in favour of maintaining the exemption*

25. In relation to the prejudice to its own commercial interests, the council has argued that there is a public interest in ensuring that it gets the best possible return for its money and disclosing the information would make this no longer possible.

26. No further arguments either in relation to the proposed damage to the council's commercial interests or to those of the lenders have been submitted to the Commissioner.

*Public interest in disclosing the information*

27. The complainant has argued that they do not believe there is any likelihood that any prejudice to the council's commercial interests exists. They have suggested that lenders make decisions about the loan terms they are able to offer based on a host of factors chief among which is the creditworthiness of the borrower. The specific details of previous loans into which the council has entered is unlikely to affect the terms on offer as lenders are already able to see the council's overall debt burden and total interest payments via the annual statement of accounts.
28. The complainant has also argued that lenders operate in a competitive market and that FOI requests to date have identified over 40 lenders which provide LOBO loans to UK local authorities. The complainant considers that the council's access to a number of such lenders would ensure that they were able to negotiate market rates for any future loans
29. In relation to the prejudice to the lenders' interests, the complainant has argued that the lenders in question are all very large financial institutions with huge outstanding portfolios of debt. They consider that the idea that disclosure of the details of a tiny percentage of those loans, each of which was made under negotiations with the council under the prevalent market conditions at the time, could possibly impact upon the lenders' ability to negotiate similar deals in the future is hardly credible.
30. The Commissioner is mindful that LOBO loans have been the subject of national scrutiny and concern. Particular concerns have been expressed about the size of local authority debt they involve and the high interest rates and lengthy schemes authorities find themselves locked into at a time when local government spending is subject to significant cuts. The Commissioner considers that these factors provide strong public interest weightings in favour of transparency and facilitating public engagement and scrutiny.

*Balance of the public interest*

31. The Commissioner has given due weighting to the commercial interests which the exemption is designed to protect. He acknowledges that, particularly at a time where there is significant public spending constraints, authorities should be able to engage in activities which

promote the best use of limited monies without this being prejudiced by disclosure.

32. However, by the same token, the Commissioner is mindful that the agreements in question relate to long term loans (40 years plus) for sums which exceed hundreds of million pounds and which bind the council to make substantial repayments. It is not the Commissioner's role to determine whether the council has acted appropriately in its pursuance of LOBO loans but the need for the public to be reassured by being able to scrutinize relevant information, particularly when such large sums are involved, is a strong public interest factor.
33. In relation to the proposed likely damage to the council's commercial interests, the Commissioner considers that, whilst this is a genuine concern and carries some weight, it is too vaguely formulated in the face of the more concrete public interest in holding decision-making about vast public expenditure to account. He also considers that disclosure of the information when set against the difficulties envisaged by the council, would be more likely to improve competition amongst lenders and assist public authorities in securing more favourable borrowing rates.
34. In relation to the potential damage to the commercial interests of the lenders, the Commissioner is mindful that, beyond the somewhat generic arguments provided in support of the engagement of the exemption, no specific public interest arguments have been submitted.
35. In terms of the relationship with the council, the Commissioner considers it very unlikely that lenders would wish to deny themselves access to potentially lucrative public sector lending agreements or, in the specific case of the council, would want to withdraw from a long term agreement.
36. In relation to the benefits of disclosure to the lenders' competitors and the resulting damage to the lenders' ability to negotiate favourable rates, the Commissioner has not been provided with public interest arguments which specifically identify the severity of or extent of such prejudice. The Commissioner notes the complainant's argument that negotiations and agreements would be predicated on existing market conditions and the specific state of the council's accounts and requirements. The Commissioner is not persuaded that there is a significant public interest in maintaining the exemption to avert the disclosure of information which is unlikely to have significant or well defined ill-effects.

37. In light of the above and, having weighed the relevant factors, the Commissioner considers that the public interest balance in this case is weighted towards disclosing the withheld information.

### **Section 41 – Information Provided in Confidence**

38. Section 41(1) of the FOIA provides that information is exempt from disclosure if it was obtained by the public authority from any other person and the disclosure by the public authority would constitute an actionable breach of confidence.

*Was the information obtained from another person?*

39. The first step is for the Commissioner to consider whether the information was obtained by the council from any other person in order to satisfy the requirements of section 41(1)(a).
40. In this instance, the withheld agreements are composed of information derived from another person, namely the lenders.
41. Having established that the requested information was in fact obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

*Actionable claim for breach of confidence*

42. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark* [1969] RPC 41. According to the decision in this case a claim for breach of confidence can be established where:

*"... three elements are normally required if ... a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."*

43. All three elements must be present for a claim to be made. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.



### *Obligation of Confidence*

44. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
45. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*, suggests that the 'reasonable person' test may be a useful one. The test was described as follows:

*"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."*

46. The council has stated that the withheld information was provided with the understanding that it would not be distributed more widely. The Commissioner notes that one of the lender's submissions also confirms that the information contains information that it clearly would not want to be placed in the public domain – something which would have been clearly understood by the council. In light of this and, having applied the "reasonable person" test, the Commissioner accepts that the information was provided in circumstances imparting an obligation of confidence.

### *Necessary quality of confidence*

47. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
48. In view of the nature of the withheld information, which provides details of the lending agreement between the council and lenders, the Commissioner is satisfied that it is not trivial in nature.
49. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. The Commissioner has therefore also considered whether the information is otherwise accessible.
50. Given the submissions provided by the council it is clear to the Commissioner that the information was not, at the time of the request, otherwise accessible. He, therefore, accepts that the information has the necessary quality of confidence.



*Detriment to confider*

51. Having considered whether the information in this case was imparted in circumstances giving rise to a duty of confidence and had the necessary quality of confidence, the Commissioner has gone on to consider whether unauthorised disclosure could cause detriment to the confider.
52. In relation to detriment, the council has provided submissions which relate to the potential impact of disclosure on its own commercial interests; however, these are not relevant to the engagement of this exemption. In order for the exemption to be engaged it must be shown that disclosure would result in detriment to the *confider*.
53. The Commissioner notes the unwillingness of the council and the lenders to disclose the information. However, this in itself is not sufficient to demonstrate that the exemption is engaged, neither is it adequate for the information to simply have the quality of confidence. Relevant supporting arguments which demonstrate the specific detriment which disclosure would cause are required. Simply stating that the disclosure of information would, as a point of principle, trigger certain actions, does not address this question. The council's suggestion, for example, that disclosure might result in a future refusal by lenders to engage with the council, for example, is not a detriment but rather a choice.
54. The Commissioner has not been provided with specific arguments which explain how disclosure of the information would affect the confiders' interests in this matter. He considers that the claimed detriment has not been demonstrated sufficiently and therefore the test of confidence fails on this limb and section 41 does not apply.
55. The Commissioner has decided that there was an obligation of confidence, that the information had the necessary quality of confidence, albeit weak, but the detriment limb of the confidence test has not been demonstrated and therefore it has not been shown that there would be an actionable claim for breach of confidence and the exemption at section 41 does not apply.

## Right of appeal

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56. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. 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.
58. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**