

Decision Notice 052/2020

LOBO Loan Borrowing

Applicant: The Applicant

Public authority: Glasgow City Council

Case Ref: 201900997



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 that this would prejudice its commercial interests, and those of the lenders, substantially.

Information was disclosed during the investigation, which the Commissioner found should have been disclosed earlier. The Council continued to withhold information on interest rates: the Commissioner found that the Council was not entitled to withhold this information and required the Council to disclose it.

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 Glasgow 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 to 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 have applied any "statutory overrides" or "capitalisation requests" in relation to 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 responded on 27 February 2019. It provided a response to all parts of the request, but withheld information for part e). The Council applied the exemption in section 33(1)(b) of FOISA (Commercial interests and the economy) to information which would fulfil this part, but did not explain why it was relying on this exemption.
3. On 8 March 2019, 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's 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 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 and the ICO found that the public interest favoured disclosure.
4. The Applicant indicated that unless the Council could offer a more robust public interest argument than the Councils against whom the UK ICO had issued Decision Notices requiring disclosure, then it should lift the application of the exemption and provide the information he originally requested. The Applicant also pointed out that the majority of Councils across the UK had provided the full, unredacted LOBO loan contracts.
5. The Council notified the Applicant of the outcome of its review on 12 June 2019. In its response, the Council explained that it was upholding its original response in relation to the original LOBO loan contracts and was continuing to rely on the exemption in section 33(1)(b) of FOISA for this information. The Council indicated that disclosure of the information would substantially prejudice the commercial interests of the banks, as it could affect their discussions with other lenders. It found that the public interest in safeguarding these commercial interests outweighed what it accepted was a significant public interest in openness and transparency in this case.
6. The Council also noted that, in terms of section 15 of FOISA, it could provide some additional information to the Applicant. It provided a table including, for each loan, the reference number, principal sum borrowed, name of the initial counterparty, dates of drawdown and maturity, whether the option to vary the interest rate had been exercised, name of existing counterparty, name of broker and value of loan.
7. 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 where he believed disclosure was in the public interest.

Investigation

8. 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.
9. On 15 August 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.

10. 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.
11. The Council provided submissions and also disclosed additional information to the Applicant (see below).

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, the Council acknowledged that further recorded information was held in relation to eight of the LOBO loans. The Council explained that it was now willing to disclose this information to the Applicant, with the remainder of the loan documentation, subject to redaction of the interest rate and any new interest rate applicable to each of the loans (as it considered this information to be exempt in terms of section 33(1)(b) of FOISA). The Council also redacted the names, signatures and contact details of those individuals involved in the agreement of the loans (as the Applicant confirmed that he was not concerned with receiving these personal data, the redaction of this information will not be considered further).

18. The Council copied the Commissioner into an email dated 24 October 2019, where it provided copies of the redacted information to the Applicant. The Applicant acknowledged receipt of this information.
19. Having considered the submission from the Council, the Commissioner accepts that, by the end of the investigation, adequate searches had been carried out by the Council of areas where relevant recorded information would be held. The Commissioner is satisfied that, where additional information was located by the Council as a consequence of these searches, this has been provided to the Applicant, subject to the redaction of information the Council considers to be exempt under section 33(1)(b) of FOISA.

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

20. Section 33(1)(b) of FOISA provides that information is exempt information if its disclosure under 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.
21. 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.
22. 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.
23. In its submission, the Council explained that it was prepared to release redacted copies of the loan contracts and associated documents to the Applicant. The Council indicated it was now only seeking to withhold the initial interest rates and new interest rates associated with each of the loans and was relying on the exemption in section 33(1)(b) of FOISA for doing so.
24. As mentioned above, copies of the redacted documents were disclosed to the Applicant on 24 October 2019 and the Applicant acknowledged receipt of these.
25. The Commissioner's consideration of the application of the exemption in section 33(1)(b) of FOISA is therefore restricted to the initial and new interest rates associated with the LOBO loan contracts.
26. The Council argued that disclosure of this information would, or would be likely to, substantially prejudice the commercial interests of both it and the banks.
27. In terms of the harm that it believed would be caused to its own commercial interests by disclosure, the Council explained that these were long term loans, ranging with terms up to 70 years. They were entered into around 15 years ago, but remained current and would continue to be so for the next 50-60 years.

28. As these LOBO loans are tradeable by the lenders on the open market and contain an option for the lender to increase the interest rate of the loan, the Council submitted that release of the interest rates would put it at a competitive disadvantage in dealing with other lenders. This could, the Council submitted, result in higher interest rates and increased costs to the Council.
29. Furthermore, should the Council decide to exercise the option to repay the loans without penalty, it would be likely to need to borrow more funds from other lenders. Therefore, the Council believed disclosure of the current interest rates could put potential lenders at a competitive advantage, as they would have prior knowledge of the interest rates currently being charged. This, the Council submitted, would make it difficult for it to achieve best value with regard to any new loans (which would also be an issue should it require to borrow additional funds).
30. With regard to the commercial interests of the lenders (banks) providing the loans, the Council believes that disclosure of the interest rates might prejudice their future position, particularly when negotiating with other public authorities.
31. The Council provided comments from three of the lenders involved. One submitted that the interest rates could be used by competitors to their advantage and could also be exploited by the press and markets to the detriment of the company's share price.
32. Another of the lenders, the German Federal Government's winding-up institution for several financial institutions, submitted that disclosure of commercial details might be commercially sensitive from the point of view of discussions with potential buyers and other lenders or investors.
33. The third lender was of the opinion that disclosure of the interest rates could create a false consumer expectation of the commercial terms it was able to offer, to the extent that it might not systematically be able to propose the same terms to its customers. This lender considered the impact of disclosure could potentially be very harmful to its LOBO business in the long term. It echoed the concerns of the other lenders as to disclosure of its interest rate allowing its competitors to take advantage of the situation to undercut its pricing, thereby weakening its bargaining position during future financial and contractual negotiations with counterparties and causing significant commercial harm to it and consequent distortion of the market.
34. This lender also argued that disclosure of the information might potentially affect the Council and the lender in any current or future negotiations and harm the ongoing commercial relationship between the parties. It did not believe disclosure of its LOBO loan documents by other Councils to be a justification for disclosure, as such disclosure would have occurred against its wishes or because it had not been consulted.
35. The Commissioner is satisfied that both the Council and the lenders have commercial interests in relation to the LOBO loan contracts.
36. 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 it wishes 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.

37. 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.
38. 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.
39. 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 its submissions on this point, the Council explained that LOBO loans are like any other debt instrument, in that once they are issued there is a market for them. The Council explained that the “price” of the loan is usually determined mainly by the future cash flows that the buyer would expect to receive over the remaining term of the loan, which in turn is influenced by the interest rate payable.
40. Whether a LOBO loan is traded on the open market and bought up by another lender is not something which is in the Council’s control or influence, the Council explained. The decision is driven by market conditions and an individual lender’s desire for return, security or liquidity. The Council noted that market conditions are influenced by the economy and extraneous factors. The Council also noted that the UK Treasury has recently increased Public Works Loan Board (PWLB) borrowing rates by 1%, which has made some forms of market loans potentially more attractive than PWLB.
41. Having considered these submissions from the Council, the Commissioner accepts that disclosure of the interest rates might cause some harm to the Council’s commercial interests, although it is not entirely clear what form that harm would take. It is certainly unclear, from the submissions received, how the risk of these loans being “bought up” would be exacerbated by the interest rates being known (presumably, they would become known at some point in negotiations between the relevant lenders in any event). Given the existence of a large, open market for any future borrowing (whether in substitution for or in addition to existing loans), together with the fact that a professional broker would be used to obtain best value for it should the Council be contemplating such borrowing, the Commissioner does not agree that any harm would be at the level of substantial prejudice.
42. In terms of the potential harm that might be caused to lenders as a consequence of disclosing the interest rates, the Commissioner accepts that a degree of discomfort might be experienced. On the other hand, the current rates will not necessarily reflect what lenders are prepared to offer for future loans. Also, this is not a question of one lender’s rates being disclosed when others are not. The greater the extent to which the rates charged by players in this market are known, to the extent that they remain relevant, the more a “level playing field” is created – which must surely be good for competition in relation to such loans, and thus good for the public purse.

43. The Commissioner acknowledges that previous disclosures, even of related information, will not necessarily be relevant to what should happen in any given case. However, it would appear that rates for the lender which has raised this issue have been disclosed for other authorities and the Commissioner has not been made aware of any specific harm resulting from such disclosures, or of any particular circumstances which distinguish these other cases from this one.
44. The arguments advanced by the Council and the lenders as to the potential harm from disclosure also appear to be somewhat contradictory. The Council submits that disclosure would lead to it facing higher interest rates and thus higher costs, whereas the lenders are of the view that their competitive advantage would be weakened by rivals undercutting them. It is possible (and, in the Commissioner's view, correct) to conclude that neither position is tenable to the extent claimed by those arguing for them, but it is clearly not possible for both sets of claims to be true.
45. In all the circumstances, 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 incorrectly applied the exemption in section 33(1)(b) of FOISA in this case.
46. 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 the public interest in this case.

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

47. 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

48. The Applicant believes 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 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.
49. 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 a right to know the full terms of such significant financial agreements between local authorities and financial institutions.
50. The Applicant considers 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.
51. In any case, 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

52. The Council acknowledged the significant public interest in openness and transparency: specifically, in this case, it took into account that disclosure of the information would increase its accountability and transparency in relation to its borrowing of money. It also recognised that it might be of interest to the public to know the details of the loan arrangements, including that there is sufficient monitoring of the loan agreements in place to mitigate its financial risk. The Council considered this public interest had already been satisfied as a consequence of the information disclosed to the Applicant.
53. The Council submitted that there was also a public interest in ensuring that it did not substantially prejudice its own commercial interests. The Council considered release of the interest rates would allow lenders to be able to identify how much interest the Council was prepared to pay and then adjust their rates accordingly. This could, the Council argued, lead to lenders increasing the current interest rates and also put the Council at a competitive disadvantage with regard to future negotiations with commercial lenders, making it difficult to achieve best value at a cost to public funds.
54. On balance, the Council concluded that protecting its commercial interests, along with the commercial interests of the lenders, outweighed the public interest in the information being disclosed. The Council does not consider disclosure of the interest rates would contribute to ensuring proper scrutiny of the loan arrangements or ensuring the public obtained value for money for public funds. The Council maintained its view that the information already disclosed to the Applicant satisfied the public interest.

Commissioner's conclusions on the public interest

55. 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 by the Council goes some way towards this.
56. Nevertheless, it is clear that, without disclosure of the interest rate(s) 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. 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 that 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.
57. 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.
58. In its public interest test arguments, the Council has focused on the harm to its own commercial interests, and those of the lenders, it considers would be caused by disclosure of the interest rates. 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 outweighs the public interest in disclosure of the interest rates in this case.

59. Having balanced the public interest for and against disclosure, the Commissioner has concluded that, in all the circumstances of the 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.
60. The Commissioner therefore finds that the Council was not entitled to withhold the information under section 33(1)(b) of FOISA. He must require it to be disclosed.

Decision

The Commissioner finds that Glasgow 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 information from the Applicant.

The Commissioner therefore requires the Council to disclose the remaining withheld information (interest rates and any new interest rates associated with each of the LOBO loans covered) by **30 April 2020**.

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

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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