

Decision Notice 051/2020

LOBO Loan Borrowing

Applicant: The Applicant

Public authority: Aberdeenshire Council

Case Ref: 201901166



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

The Commissioner investigated and found that the Council had failed to comply with FOISA by not providing everything it held, which fell within scope of the Applicant's request and which it did not consider exempt. The Commissioner also found that the Council could not rely on the commercial interests exemption in section 33(1)(b) FOISA for information it had already disclosed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3), (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 Aberdeenshire 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 have applied for 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 responded on 6 March 2019. It provided a response to all parts of the request and attached a spreadsheet which detailed certain information drawn from the LOBO loan contracts it had in place.
 3. On 9 May 2019, the Applicant contacted the Council and, referring to his original request, asked that it provide copies of its original LOBO loan contracts.
 4. A response was provided by the Council on 31 May 2019, where it explained that it was relying on the exemption in section 33(1)(b) of FOISA (Commercial interests and the economy) for withholding copies of the LOBO loan contracts. The Council informed the Applicant that the information was commercially sensitive and would be valuable to competitors, and therefore disclosure would cause commercial damage.
 5. Having considered the application of the public interest test, the Council advised that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information, because “disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money”.
 6. On 4 June 2019, the Applicant wrote to the Council, requesting a review of its decision regarding copies of the original LOBO loan contracts. The Applicant made reference to four decision notices issued by the UK Information Commissioner (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 and the ICO found that the public interest favoured disclosure. The Applicant indicated that, unless the Council could offer a more robust argument in support of its position on the public interest than the Councils against whom the ICO had found in the above cases, it should lift its 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 full, unredacted LOBO loan contracts.
 7. The Council notified the Applicant of the outcome of its review on 27 June 2019. In its response, the Council upheld its reliance on the exemption in section 33(1)(b) of FOISA for withholding the actual LOBO loan contract documents. The Council explained that revealing commercially sensitive information, such as the level of interest rates and broker fees for these loans, could be substantially prejudicial to the Council then and in future negotiations. It added that revealing such commercially sensitive information into the public domain could also harm the interests of third parties, such as the institutions providing the LOBO loans. In considering the application of the public interest test, the Council concluded that the public interest in maintaining this exemption outweighed the public interest in disclosing the information to the wider public.
 8. On 9 July 2019, the Applicant wrote to the Commissioner. The Applicant 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 which he believed it was in the public interest to disclose.

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 20 September 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 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 explained that it held further documentation relating to a contract for one of the LOBO loans it had in place (but not the contract itself). However, it explained that it no longer held full documentation as the loan had been repaid over 13 years

ago and the information fell outwith its data retention period. The Council did, however, provide a copy of the documentation evidencing the cancellation of that loan.

18. In seeking to evidence that original documentation was no longer held for the cancelled loan, the Council explained that any records would have been filed in paper format, but the relevant data retention period had expired. The Council also provided a copy of its "Suggested Document Retention Period for a Large Local Authority" covering retention periods for Accountancy and Financial Documents. This notes that loan records and correspondence should be retained for two years (from what is not entirely clear, but presumably from repayment/expiry at the latest) plus the current year. As the LOBO loan in question was repaid over 13 years ago, the Commissioner is satisfied that any records relating to this would fall outwith the appropriate retention period.
19. Having considered the submissions from the Council, the Commissioner accepts that the Council took adequate steps in the circumstances to identify and locate information comprising the original LOBO loan contracts.

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 FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including 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 original submission to the Commissioner, the Council explained that it was relying on the exemption in section 33(1)(b) of FOISA for interest rate margins and commission rates.
24. The Council explained that it was its own commercial interests it is seeking to protect, together with those of the lenders. The Council argued that disclosure of the interest rate margins and commission rates would put lenders and brokers at a disadvantage when trying to negotiate other deals. It also submitted that making the interest rates and margins charged public knowledge could put lenders at a disadvantage if they wish to sell on the bond.
25. In seeking to justify its view that its own commercial interests would be substantially prejudiced by disclosure, the Council explained that it is seeking to protect its position against potential higher interest rate costs and the possible risk of having to refinance. The Council was concerned that it might be forced to take alternative loans out at a time when rates are high.

26. The Council also considered that by making the withheld information public it was at more risk of increased cost, by disclosing information which would give banks and financial institutions an advantage in raising rates.
27. Whilst the Council provided submissions detailing why it considered the interest rates and commission rates should be withheld under section 33(1)(b) of FOISA, the Commissioner is unable to give any weight to these submissions in this case. This is because the Council disclosed to the Applicant the initial and current interest rates associated with each of the LOBO loans when it responded to his request for information. There would appear to be no basis for concluding that this disclosure was made other than under FOISA, in response to this request.
28. Whilst no commission rates were disclosed, it is clear from the withheld information provided to the Commissioner by the Council that commission rates are not identifiable from the contract documentation. They do not appear to be held within the contracts (although, as they were not mentioned specifically in the request, there was no need for the Council to notify the Applicant of this).
29. As the Commissioner could not consider the original submission made by the Council, for the reasons set out above, the Council was invited to provide a submission which specified the particular information in the contract documents it was seeking to rely on section 33(1)(b) of FOISA for.
30. In response, while making some other comments about the terms of the request which are considered below, the Council stated (following consultation with the lenders) that it was relying on the exemption in section 33(1)(b) for the following information:
 - Named officer details
 - Lender and borrower's payment and contact details
 - Council and lenders' bank details
 - Brokers' names
 - Addresses of financial institutions
 - Personal data, including names and signatures.
31. The Applicant was advised that the Council was relying on the exemption in section 33(1)(b) for withholding the information set out above, and he indicated that he had no objection to the Council withholding it.
32. The Commissioner is therefore not required to consider any arguments advanced by the Council for withholding the information detailed at paragraph 30.
33. The Council has not relied on any exemption in FOISA for the remaining information in the loan contracts.
34. Because the Council has not provided any submissions arguing that any of the remaining information is exempt, the Commissioner must conclude that it failed to comply with section 1(1) of FOISA in withholding this information from the Applicant. The Commissioner therefore requires the Council to disclose to the Applicant the information contained within the contract documents for each LOBO loan held which falls within the scope of the request, subject to redaction of the information described in paragraph 30 above (and, if the Council wishes, the interest rates disclosed already). To make it clear what can be withheld, the Council will be provided with marked-up copies of the contracts along with this decision.

Clarification required?

35. As noted above, part e of the Applicant's request was for copies of LOBO contracts.
36. During the investigation, in its response to the request for further submissions, the Council told the Commissioner that it considered the Applicant should be invited to clarify precisely what information he was seeking. The Council indicated that the Applicant could have specified particular terms of the contract, such as amounts or interest rates, but had not.
37. The Council noted that FOISA "does not require copies of documentation to be provided, only information". Given what it considered to be a lack of specification beyond the terms of the relevant part of the request (part e), it was not clear to it what information the Applicant was seeking in addition to that already disclosed.
38. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and The Environmental Information (Scotland) Regulations 2004 (commonly known as the Section 60 Code) recognises that FOISA gives a right of access to information and not a right of access to copies of specific documents. However, the Section 60 Code also goes on to say (paragraph 5.2.1):

... authorities should not refuse requests for copies of documents (e.g. a report, a minute or a contract) as long as it is reasonably clear from the request that it is the information recorded in the document that the applicant wants.
39. As mentioned already, 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.
40. Under section 1(3) of FOISA, where an authority requires further information in order to identify and locate the requested information, then they can ask the applicant to provide this prior to responding to the request. If the Council was truly unclear as to what the Applicant was requesting, to the extent that it was unable to identify and locate the information in question (the LOBO contracts), then it should have sought clarification from him at the time it received his request for information.
41. In line with the Section 60 Code, the Council could also have provided reasonable advice and assistance to the Applicant (in line with its duty under section 15 of FOISA) to assist him in identifying the information he was seeking. It did none of this.
42. In any case, having read the Applicant's request of 13 February 2019 and that of 9 May 2019 (which refers back to the request of 13 February 2019), the Commissioner considers it perfectly clear the Applicant is requesting the information contained in the original LOBO contracts. It is not apparent why it should have required to invoke section 1(3), even if it had wished to do so. Now, it appears equally clear to the Commissioner that the Applicant continues to seek such information from the contracts as has not been made available to him already, subject to his confirmation that he is not looking for the information described in paragraph 30 above. In the circumstances, that appears to be an entirely intelligible – and reasonable – position for him to be taking: it should not require further explanation.
43. As noted above, it is true that FOISA confers a right to recorded information rather than a specific right to documents. It is, however, common for information to be contained in documents, as indeed the requested information was in this case. It may be possible to fulfil a request for information without providing the document(s) in which that information is to be

found, although it would appear to be a rather cumbersome means of fulfilling a request which still embraces a considerable proportion of the contracts in question. What the Commissioner would make clear is that the distinction between information and documents is not there to be employed as a device to justify not disclosing what is clearly information, simply because it happens to be held in a particular format: FOISA sets out what must be presumed to be a comprehensive code for refusing to comply with the duty under section 1(1) and it is not open to Scottish public authorities to create other reasons for refusal.

Decision

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

The Commissioner finds that, because it disclosed the interest rates associated with each LOBO loan when responding to the Applicant's request, the Council could not thereafter rely on the exemption in section 33(1)(b) of FOISA for seeking to withhold this information.

The Commissioner also finds that, by failing to disclose certain information contained in the withheld LOBO loan contracts for which it was not in fact relying on any exemption(s) in FOISA, the Council failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Council to disclose information from each of the contracts held for the LOBO loans, subject to the redaction of the information highlighted in the marked-up copies provided to the Council, 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.

...

- (3) If the authority –

(a) requires further information in order to identify and locate the requested information;

and

(b) has told the applicant so (specifying what the requirement for further information is), then, provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

...

- (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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