**First-tier Tribunal**
**General Regulatory Chamber**
**Information Rights**

**Appeal References: EA/2020/0241**
**EA/2020/0242**
**Neutral Citation Number: [2022] UKFTT 00375 (GRC)**

**Heard remotely (by CVP) on 18 & 19 July 2022**
**Deliberations in private on 27 September 2022**
**Decision given on 17 October 2022**

**BEFORE:**

**JUDGE ANTHONY SNELSON**
**DR AIMÉE GASSTON**
**MRS ROSALIND TATAM**

**Between**

**GARETH DAVIES**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

First Respondent

**and**

**THURROCK COUNCIL**

Second Respondent

## DECISION

On hearing Mr Leo Davidson, counsel, on behalf of the Appellant and Mr Philip Coppel QC[1], leading counsel, on behalf of the Second Respondent, the majority decision of the Tribunal is that:

[1] Now KC, following the accession of the King

(1) In Appeal Reference EA/2020/0241 the appeal is allowed in part and a substituted decision notice is issued in place of that given by the First Respondent, in the following terms:

(i) The Second Respondent was entitled to apply the exemptions under the Freedom of Information Act 2000 ('FOIA'):

(a) s36(2)(c) in respect of the entirety of the Appellant's request for information dated 2 October 2019 ('the first request') and

(b) s43(2), in respect of the first request, paras 1.3 and 2.4 ('the requests for interest rate information') only;

(ii) Save as stated in (i), the Second Respondent was not entitled to rely on the exemptions under FOIA on which it relied;

(iii) The public interest in maintaining the exemptions referred to in (i) above in respect of the requests for interest rate information exceeds the public interest in disclosing that information;

(iv) Save as stated in (iii), the public interest in disclosing the information requested by the first request exceeds any public interest in maintaining any exemption relied upon by the Second Respondent;

(v) Accordingly, no later than 42 days from the date of promulgation of this substituted decision notice, the Second Respondent is ordered to disclose to the Appellant the information requested by him by the first request save for that within the scope of the requests for interest rate information;

(vi) No other step is required.

(2) In Appeal Reference EA/2020/0242 the appeal is allowed in part and a substituted decision notice is issued in place of that given by the First Respondent, in the following terms:

(i) The Second Respondent was entitled to apply the exemptions under FOIA:

(a) s36(2)(c) in respect of the Appellant's request for information dated 2 December 2019 ('the second request') and

(b) 43(2), in respect of the second request, paras (1)(G) and (3)(G) ('the requests for forecast returns information') only;

(ii) Save as stated in (i), the Second Respondent was not entitled to rely on the exemptions under FOIA on which it relied;

(iii) The public interest in maintaining the exemptions referred to in (i) above in respect of the requests for forecast returns information exceeds the public interest in disclosing that information;

(iv) Save as stated in (iii), the public interest in disclosing the information requested by the second request exceeds any public interest in maintaining any exemption relied upon by the Second Respondent;

(v) Accordingly, no later than 42 days from the date of promulgation of this substituted decision notice, the Second Respondent is ordered to disclose to the Appellant the information requested by him by the second request save for that within the scope of the requests for forecast returns information;

(vi) No other step is required.

## AMENDED REASONS[2]

### Introduction

1. The Appellant, Mr Gareth Davies, who also uses the forename Gerald ('Mr Davies'), is an investigative journalist.

2. The Second Respondent, Thurrock Council ('the Council'), is a local authority.

3. On 2 October 2019 Mr Davies submitted to the Council a request for information, pursuant to the Freedom of Information Act 2000 ('FOIA') in (so far as material) the following terms:

> **I am emailing to request the following information under the Freedom of Information Act 2000. The first part of my request relates to money borrowed by the council from other local authorities, as detailed by the government's borrowing and investment live table which can be found here: [web address supplied] According to the table, the council's outstanding borrowing relating to loans (both short and long-term) from other local authorities was £1,039,900,000 as of Q1 2019/20.**
>
> **In regards to the above figure, I would like to know:**
>
> **For each individual loan taken by the council:**
> **1. The local authority/lender name**
> **1.1 The amount advanced (the initial amount received)**
> **1.2 The outstanding balance**
> **1.3 The interest rate**
> **1.4 The settlement date (the date the loan was agreed)**
> **1.5 The agreed maturity date (the date on which the loan is set to end)**
> **1.6 Brief summary of the purpose of the loan**
> **1.7 Any platform used during the borrowing process …**
>
> **According to the table referenced above, the total outstanding amount lent by the council to other local authorities was £41,000,000 as of Q1 2019/20.**
>
> **In reference to this figure, I would like to know:**
> **2. For each individual loan:**
> **2.1 The local authority/lender name**
> **2.2 The amount advanced (the initial amount received)**
> **2.3 The outstanding balance**
> **2.4 The interest rate**
> **2.5 The settlement date (the date the loan was agreed)**
> **2.6 The agreed maturity date (the date on which the loan is set to end)**
> **2.7 Any platform used during the borrowing process …**
> **2.8 Where Thurrock Borough Council got the money from**

4. On 2 December 2019 Mr Davies submitted to the Council a further request for information pursuant to FOIA, in, so far as material, the following terms:

[2] The sole amendment adds: "… , who also uses the forename Gerald" in para 1, and this footnote.

**I am emailing to request the following information under the Freedom of Information Act 2000. The authority's 2018/19 accounts state: "The Council holds long term debtors of £740m as at 31 March 2019. £702m of the balance relates to long term capital investment in the renewable energy sector secured by the associated assets."**

**1) Can you provide a breakdown of the individual investments that make up that £702 million figure, including for each:**
**A) The amount of money invested by the council**
**B) The date on which the investment took place**
**C) The recipient of the money**
**D) The type of investment (bond, stock, mutual fund, etc)**
**E) The length of the investment**
**F) The name and location of the associated asset**
**G) Forecast gross and net returns across the investment period**
**H) The name of the broker (or any equivalent entity) which notified the authority about the investment opportunity**
**I) How the investment was financed (short-term borrowing from local authorities, PWLB, reserves, etc)**

**2) As of 02/12/2019, what is the total of:**
**A) The council's long term debtors**
**B) The long term capital investment in [the] renewable energy sector**

**3) For all investments not included in the answer to question one (i.e. all made since 31 March 2019 to 02/12/2019) please provide the following information:**
**A) The amount of money invested by the council**
**B) The date on which the investment took place**
**C) The recipient of the money**
**D) The type of investment (bond, stock, mutual fund, etc)**
**E) The length of the investment**
**F) The name and location of the associated asset**
**G) Forecast gross and net returns across the investment period**
**H) The name of the broker (or any equivalent entity) which notified the authority about the investment opportunity**
**I) How the investment was financed (short-term borrowing from local authorities, PWLB, reserves, etc)**

5. The Council responded to the requests on 1 November 2019 and 8 January 2020 respectively, supplying a limited amount of information but refusing the balance, citing FOIA, s43(2) (prejudice to commercial interests) and, in the case of the second request, s36(2) (prejudice to the effective conduct of public affairs).

6. Following internal reviews, the Council upheld its initial responses.

7. Mr Davies presented separate complaints to the Commissioner about the way in which his requests for information had been handled. Investigations followed.

8. By two Decision Notices, both dated 14 July 2020, the Commissioner determined that the Council was entitled to rely, in relation to each request, on the exemption under s43(2) and judged it unnecessary to rule on the applicability of s36(2).

9. On 9 August 2020, Mr Davies appealed to the Tribunal against both adjudications of the Commissioner.

10. The two appeals were managed and listed together. Pursuant to an order of the Tribunal of 2 March 2021, the Council was joined as Second Respondent. Eventually, on 8 December 2021, a Tribunal consisting of a judge and a non-legal member issued a decision allowing Mr Davies's appeals. Unfortunately, however, that ruling had to be set aside on the ground that the Tribunal had not been properly constituted.

11. On 18 July this year, the appeal came before us to be argued for the second time. It took the form of a 'remote' hearing, conducted by CVP, with two sitting days allocated. Mr Davies was represented by Mr Leo Davidson, counsel, and the Council by Mr Philip Coppel, then QC, leading counsel. The Commissioner was not represented before us, preferring to rely on the DN and subsequent written submissions.

12. We had before us voluminous bundles of documents, open and closed, and witness statements in the names of Mr Sean Clark, the Council's Corporate Director of Resources and Place Delivery, and Mr Tim Hallam, formerly the Council's Deputy Monitoring Officer. Both witnesses gave evidence and were cross-examined. Some of Mr Clark's evidence given in closed session, following which a gist prepared by Mr Coppel was approved by the Tribunal and shared with Mr Davidson before he made his closing submissions.

13. Very shortly before the hearing, Mr Davies had served a witness statement and some new documents. This led to an objection by the Council at the start of the hearing and a postponement application. The judge made it clear that the late evidence would be allowed in, if at all, only on the basis that the Council was entitled to a postponement (to a fresh date) to enable it to respond appropriately. Mr Davies then abandoned his application for permission to rely on the statement and documents.

14. Also in the papers before us was a statement of Mr Ian Walsh, dated 22 May this year. At the time when the statement was made he was a director of a least two companies in the Toucan group of companies (as to which, see further below), but his association with the group had ended before the hearing. Mr Coppel told us that he would not be calling Mr Walsh or placing any reliance on his statement.

15. We made it known that, before the hearing, two members of the Tribunal had swiftly pre-read the statements of Mr Walsh and Mr Davies and glanced at the late documents which Mr Davies had sought to rely upon. We also assured the parties that we felt well able to put out of our minds had been excluded. Counsel were content to trust us to do so.

16. Evidence and argument accounted for the entirety of the two-day allocation and it was therefore necessary to book a further sitting day for our deliberations. 27 September was the earliest mutually convenient date. We 'met' remotely that day and reached decisions on all points. In the event, we were not able to agree on the outcome. The majority view of Judge Snelson and Dr Gasston is summarised in our Decision above. Our Reasons below explain the majority view and the dissenting opinion of Mrs Tatam.

## The Statutory Framework

*Local government finance*

17. The Council's resistance to the appeal rested in significant part on the contention that the public interest in ensuring proper scrutiny of local government finances is amply served by the statutory audit machinery. Mr Coppel helpfully summarised its key features in his skeleton argument:

> **35. The Local Audit and Accountability Act 2014 ("the 2014 Act") replaced the Audit Commission Act 1998. The audit and accountability system provided by the 2014 Act is the latest iteration of a system that started with the Poor Law Act 1844 (dealing with the financial accountability of parishes and which gave every person liable to be rated to the relief of the poor with a right to inspect the parish books of account and to make objections to those accounts before the auditor). It is not necessary to trace the evolution of this system. It is sufficient to observe that is a well-developed system that has both stood the test of time and evolved with the times.**
>
> **36. Thurrock is a "relevant authority" within the meaning of the 2014 Act: s 2. In summary, the effect of this is that:**
> **(a) Thurrock must keep "adequate accounting records" as defined in s 3(2) of the 2014 Act: s 3(1).**
> **(b) The accounts of Thurrock for a financial must be audited in accordance with the 2014 by an auditor appointed under that Act: s 4(1).**
> **(c) The Comptroller and Auditor General is required to prepare a code of audit practice prescribing the way in which local auditors are to carry out their functions under the 2014 Act: s 19 and Sch 6. The Comptroller and Auditor General issued a new code of practice in 2020. This sets out in detail the principles that are to be applied by an auditor and what must be reported by the auditor.**
> **(d) The statutory duties of the auditor include (s 20):**
> **"(1) In auditing the accounts of a relevant authority other than a health service body, a local auditor must, by examination of the accounts and otherwise, be satisfied—**
> **(a) that the accounts comply with the requirements of the enactments that apply to them,**
> **(b) that proper practices have been observed in the preparation of the statement of accounts, and that the statement presents a true and fair view, and**
> **(c) that the authority has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources."**
> **(e) In carrying out an audit of Thurrock, the local auditor has an unfettered right of access to all documents held by Thurrock and a right to interrogate Council members, officers and employees of Thurrock: see s 22. Non-compliance with s 22 is a criminal offence: s 23.**

**(f) In auditing Thurrock, the local auditor must consider whether, in the public interest, the auditor should make a report on any matter coming to the auditor's attention: Sch 7, para 1. Where the local auditor makes such a report, Thurrock must publish it and give notice where the public may inspect it: Sch 7 para 4.**

**(g) The auditor may also make written recommendations: Sch 7, para 2.**

**(h) The 2014 Act provides its own regime for the inspection and taking of copies of the statements of account and the various documents prepared by the local auditor: ss 25 and 26. This is a carefully calibrated regime and specifically provides for the protection from disclosure where that would prejudice commercial confidentiality and there is no overriding public interest in favour of disclosure: s 26(5).**

**(i) A local government elector for Thurrock may raise objections to the local auditor on anything that "concerns a matter in respect of which the auditor could make a public interest report....": s 27(1). If such an objection is made, the local auditor must decide whether to consider it and, if so, whether to take action: s 27(3). The local auditor may not refuse on the ground of proportionality to consider an objection which the auditor thinks might disclose serious concerns about how the relevant authority is managed or led: s 27(5).**

**37. The 2014 Act is supplemented by the Accounts and Audit Regulations 2015, made under s 32(3) of the 2014 Act. These:**

**(a) Make specific provision for a local authority's accounting records and control systems, requiring there to be measures to ensure that financial transactions of the authority are recorded as soon as, and as accurately as, possible, that there are provisions to enable the prevention and detection of inaccuracies and fraud, and to ensure that risk is appropriately managed: reg 4. This system must be reviewed annually: reg 6.**

**(b) Spell out the process for the publication of accounts and audit: regs 7-13.**

**(c) Give further detail on the public inspection and objection procedure: regs 14-17.**

*Freedom of information*

18. FOIA, s1 includes:

> **(1) Any person making a request for information to a public authority is entitled–**
>
> **(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and**
>
> **(b) if that is the case, to have that information communicated to him.**

'Information' means information "recorded in any form" (s84).

19. The right under s1 is subject to exemptions. FOIA, s36 includes:

> **(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –**
>
> **…**
>
> **(b) would, or would be likely to prejudice –**
>
> **(i) the free and frank provision of advice, or**
>
> **(ii) the free and frank exchange of views for the purposes of deliberation, or**
>
> **(c) would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.**

20. By s43(2), information is exempt if its disclosure under FOIA "would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

21. In assessing (for the purposes of ss36 and 43) prejudice and/or the risk of prejudice, we direct ourselves in accordance with the decision of the FTT in *Hogan and Oxford City Council v ICO* (EA/2005/0026), which proposes three questions. First, what interest (if any) is within the scope of the exemption? Second, would or might prejudice in the form of a risk of harm to such interest(s) that was "real, actual or of substance" be caused by the disclosure sought? Third, would such prejudice be "likely" to result from the disclosure in the sense that it "might very well happen", even if the risk falls short of being more probable than not? (*Hogan* is, of course, not binding on us but it draws directly on high authority[3] and has been specifically approved by the Court of Appeal: see *Department of Work and Pensions v IC* [2017] 1WLR 1.)

22. If a qualified exemption, such as any under ss36 or 43, is shown to apply, determination of the disclosure request will turn on the public interest test under s2(1)(b), namely whether, "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". The proper approach, as explained by the Upper Tribunal in *APPGER v IC* [2013] UKUT 560 (para 149) is:

> **… to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure would (or would be likely to or may) cause or promote.**

23. The relevant date for the purposes of applying any public interest balancing test and, it seems, determining the applicability of any exemption, is the date on which the request for information was refused, not the date of any subsequent review: see *Montague v ICO and DIT* [2022] UKUT 104 (AAC), especially at paras 47-90.

24. Where more than one exemption is relied upon, each must be considered and balanced separately. It is not permissible to "aggregate" public interests under different exemptions when applying the public interest balancing test: see *Montague*, paras 15-46.

25. The appeal is brought pursuant to the FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(1) If on an appeal under section 57 the Tribunal consider –**

[3] In particular, on the meaning of "likely", the judgment of Munby J in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin).

**(a) that the notice against which the appeal is brought is not in accordance with the law; or**

**(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,**

**the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the tribunal shall dismiss the appeal.**

**(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.**

## Facts

26. It is a notorious fact that, in recent years, local authority finances have been under considerable strain. Apart from anything else, the 'austerity' years have seen an unprecedented reduction in funding derived from Central Government grants. The inevitable consequence has been pressure to reduce expenditure and increase income. But financial constraints do not absolve public bodies from their statutory obligations. And increasing income through Council Tax rises is always politically unattractive. Like all local authorities, the Council has been faced with these uncomfortable realities for over a decade.

27. Historically, the Council's reserves were modest. They stood at £8m in 2009/10 and fell to £2m over the following two years. In the usual way, the Council placed such reserves as it had into investments to protect them against inflation. Conventional investments took the form of mortgages, business loans and money market funds. These were publicly declared in annual accounts and/or other public documents.

28. In 2016, the Council invested for the first time in the Churches, Charities and Local Authority Property Fund. Mr Clark told us without challenge (witness statement, para 12) that that fund is not seen as commercially sensitive "due to its public reporting and oversight". The investment (of £50m) was publicly declared in the mid-year Treasury Report for 2016/17 (para 3.8), with details of the applicable interest rate, the return achieved for the first half-year and the anticipated return for the second half-year.

29. In the same report (para 3.9), the Council supplied the following information concerning another new investment:

> **The Council has invested in a further long term opportunity with a solar energy investment fund managed by Rockfire Ltd. The company has worked with a number of authorities previously to identify investment opportunities with returns significantly above current interest rate levels. Along with 3 other authorities, the Council has invested £15m and will receive a 5% return over each of the first four years and then 8% in year 5 along with repayment of the principal sum at the end of the term. This is a gross return of £4.2m before financing costs of less than £0.5m over the five years.**

30. The investment in Rockfire Ltd ('Rockfire') – the first of many by the Council in that company – took the form of a bond. The idea is simple. In return for a capital payment, the bond issuer delivers a bond to the investor, promising to pay interest as stipulated and, at the end of the specified term, to repay the principal in full. The prudent investor will, of course, need to be satisfied that the bond issuer will be able and willing to meet all the obligations specified in the bond. Any security offered must be adequate to underwrite the debt. If the security offered consists of a particular asset (say, a solar energy farm), the prudent investor will need to be satisfied that any valuation put forward by the bond issuer is reliable.

31. Mr Clark told us (witness statement, para 16), and we accept, that negotiations leading to individual bond deals entail detailed discussions between teams of professionals, in which commercially sensitive information (relating to such matters as the interests of relevant third parties, prices and valuations, returns and anticipated returns, business assumptions and business plans) is shared and debated. These exchanges take place on the understanding that the material under discussion is strictly confidential.

32. We were also told that the contractual documents governing individual bond transactions contained confidentiality clauses.

33. At a meeting on 25 October 2017 the full Council adopted a resolution, proposed in a report prepared by Mr Clark, in the following terms:

> **1. [agreeing] the revised Treasury Management Indicators as set out in … Appendix 1.**
>
> **2. [agreeing] that cash investment decisions [falling] under a capital definition be treated as capital expenditure and the Treasury Management Indicators amended as necessary.**

Appendix 1 (to Mr Clark's report) set out vastly increased 'prudential' limits to the Council's powers to borrow and make investments. In particular, the total external debt limits for the years 2017/18, 2018/19 and 2019/20 were set at (to the nearest £1m) £989m, £911m and £919m respectively.

34. Mr Clark in his report (para 3.8) explained that re-classifying cash investments as capital expenditure would have the consequence that they would not need to be shown as balance sheet items in the Council's accounts.

35. In his evidence, Mr Clark acknowledged that the strategy first authorised by the full Council in October 2017 was underway well before then. By March of that year £65m had already been invested (and no doubt a roughly comparable sum borrowed), apparently on the strength of informal discussions (at which

minutes were not taken) between Mr Clark and the Leaders and Deputy Leaders of the three main political groups on the Council.

36. After October 2017 it seems that the Council's borrowing and investment activities were wholly or largely conducted within the (notably generous) bounds of the new Strategy.[4] The scale of the investment programme grew rapidly. As at Q1 2020/21, the Council's investments stood at, to the nearest £1m, £980m.

37. In cross-examination, Mr Clark did not dispute that over a short period the Council invested in solar energy businesses to the tune of some hundreds of millions of pounds. He also accepted that such investment decisions were not based on formal, independent due diligence exercises. He told us, as we understood him, that this was because the Council had no in-house expert on solar farm valuation, but added, "We did general due diligence. We did Q & A's."

38. Despite the huge increase in the scale of the investment programme after October 2017, there seems to have been no change in the extent to which Mr Clark shared relevant information with elected Council members. It seems that members were never given details of investment proposals or decisions in written form. The practice of holding unminuted meetings with the Leaders and Deputy Leaders of the political groups (we were not told the dates or how often the meetings took place) seems to have continued as before. Mr Clark told us that it was open to them to share the information he imparted to them with their elected colleagues as they saw fit. He also commented that, at the private, unminuted meetings, it had been open to the Leaders and Deputy Leaders to ask him more questions than they did. It is difficult for us to know what to make of these remarks of Mr Clark. In the absence of any minute of any of these meetings, we have no way of knowing what information he passed on to the Leaders and Deputy Leaders. That being so, if his comments were intended as some sort of reproach to the Leaders and Deputy Leaders for being insufficiently inquisitive about what was being done, or proposed to be done, with the Council's funds, we would not wish to associate ourselves with it.

39. It may be a statement of the obvious to record that these investments were not made out of cash reserves. The Council has held no substantial reserves in the last decade, let alone reserves running into hundreds of millions of pounds. Mr Clark told us (witness statement, para 25) that the "vast proportion" of the money used by the Council to fund its investment programme was borrowed from other local authorities.

40. As we have noted, Mr Davies in his first request quoted official figures recording the Council's outstanding debt on loans from other local authorities as at Q1 of 2019/20 at a fraction under £1.04bn.

[4] As we will mention, press reports in May 2020 claimed that the borrowing limits were exceeded.

41. Mr Clark agreed in evidence that the sums invested kept pace, broadly speaking, with borrowing. Accordingly, it is not in dispute that the Council's levels of borrowing and investment climbed to around four times its annual budget of around £250m.

42. The Council was not by any means alone in borrowing from other local authorities. But by the end of the year 2018/19, it was the most leveraged of any local authority by a massive margin. On Mr Davidson's arithmetic, its level of debt was twice that of the nearest competitor (Lancashire) and around forty times the national average. Mr Clark did not care to engage with precise calculations but was constrained to accept that the Council's borrowing placed it "at the top end". [5]

43. We were referred to the Statutory Guidance on Local Government Investments (3rd Edition) issued under section 15(1)(a) of the Local Government Act 2003 ('the 2003 Act') and effective for financial years commencing on or after 1 April 2018. No doubt similar guidance applied to earlier years. At para 15 *et seq*, under the heading of "Transparency and Democratic Accountability", the Guidance stipulates that local authorities should publish at least one Investment Strategy each financial year. At para 26 it states that any prudent Strategy will be directed to achieving the twin objectives of security and liquidity. Para 41 spells out the need for Investment Strategies to state in detail the local authority's approach to risk assessment, including not only guiding principles but also concrete measures taken. Later in the document, we read this:

> **Borrowing in advance of need**
>
> **46. Authorities must not borrow more than or in advance of their needs purely in order to profit from the investment of the extra sums borrowed.**
>
> **47. Where a local authority chooses to disregard the Prudential Code and this Guidance and borrows or has borrowed purely to profit from the investment of the extra sums borrowed the Strategy should explain:**
>
> - **Why the local authority has decided not to have regard to this Guidance or to the Prudential Code in this instance; and**
> - **The local authority's policies in investing the money borrowed, including management of the risks, for example, of not achieving the desired profit or borrowing costs increasing.**

44. Local authorities are obliged to have regard to the Statutory Guidance (the 2003 Act, s15(1)).

[5] At another point in his evidence he went rather further, arguing that the Council was "unique" in its level of borrowing and that this made it necessary to shield its activities from public scrutiny.

45. Attached as Annex A to the 3rd Edition of the Statutory Guidance is an informal commentary which, among other things, draws attention to certain events and circumstances which had led to the decision to issue a fresh edition. It includes:

> **Objectives in updating the Guidance**
>
> **5. The 2nd edition of this Guidance, which was issued in 2010, reflected concerns raised by the [Communities and Local Government] and Treasury Select committees as part of their enquiries into the financial crash of 2007-8. The key areas of focus were:**
>
> - **The practice of investing for yield, especially in Icelandic Banks;**
> - **The need for transparent investment strategies; and**
> - **The use of Treasury Management advisors.**
>
> **6. The changes made to the 3rd edition of this Guidance reflect changes in patterns of local authority behaviour. Some local authorities are investing in non-financial assets, with the primary aim of generating profit. Others are entering into very long term investments or providing loans to local enterprises or third sector entities as part of regeneration or economic growth projects that are in line with their wider role for regeneration and place making.**
>
> **7. In addition, the National Audit Office and the Public Accounts Committee have raised a number of concerns about local authority behaviour that this guidance aims to address. These are:**
>
> - **Local authorities are exposing themselves to too much financial risk through borrowing and investment decisions;**
> - **There is not enough transparency to understand the exposure that local authorities have as a result of borrowing and investment decisions; and**
> - **Members do not always have sufficient expertise to understand the complex transactions that they have ultimate responsibility for approving.**

46. The "Prudential Code" referred to in the Statutory Guidance is the statutory code of practice issued by the Chartered Institute of Public Finance and Accountancy ('CIPFA'), 2017 Edition.[6] In an Executive Summary, it states:

> **E16 In order to ensure that over the medium term net debt will only be for a capital purpose, the local authority should ensure that gross external debt does not, except in the short term, exceed the total of the capital financing requirement in the preceding year plus the estimates of any additional capital financing requirement for the current and next two financial years. Authorities must not borrow more than or in advance of their needs purely in order to profit from the investment of the extra sums borrowed. …**
>
> **E17 Local authorities are reminded that the prime policy objective of their treasury management investment activities is the security of funds, and they should avoid exposing public funds to inappropriate or unquantified risk. Authorities should consider a balance between security, liquidity and yield which reflects their own risk appetite but which prioritises security and liquidity over yield. …**

[6] Its full title is *The Prudential Code for Capital Finance in Local Authorities*.

47. In a report of February 2020 on local authority investment in commercial property the National Audit Office voiced concerns about "weaknesses in some authorities including insufficient transparency and reporting to elected members or the public; limited internal challenge to decision making; reduced governance to enable faster decision-making; and limited capacity and skills at officer level."[7]

48. To like effect, the Public Accounts Committee in a report of July 2020[8] passed these comments:

> **10. Local governance arrangements are not robust enough with some authorities' commercial investments not being properly transparent or subject to adequate scrutiny and challenge. In May 2019 this Committee expressed concern about weak arrangements for the management of risk in local authorities' commercial investment. We have recently needed to make clear to central government that commercial sensitivity is not an adequate excuse for concealing risk and uncertainty. Accordingly, we were disturbed to receive written evidence as part of this inquiry which highlighted limited reporting to members, decision-making by very small groups, and a reliance on commercial sensitivity to excuse this kind of behaviour. The Centre for Public Scrutiny told us that, in some councils, member governance has not caught up with commercial activity and a change in culture is required. Some local capital strategies still do not contain the level of transparency encouraged by the Department.**
>
> **…**
>
> **26. There is clear evidence about governance problems relating to local authority commercial investments. Based on its recent research, the Centre for Public Scrutiny reported that "In some councils member governance has not caught up with commercial activity"; the need for culture change is the greatest challenge to effective and safe commercial activity. CIPFA's Chief Executive expressed some concerns about Chief Financial Officers (Section 151 Officers) at a minority of councils feeling inhibited about speaking truth to power. He stressed it is important that the Section 151 Officer is a senior director and therefore can give proper but unwelcome advice about financial strategies dependent on commercial income. Alternatively the Section 151 Officer may fear that, if they give such advice, they may see their roles demoted. External auditors have expressed a range of concerns, including insufficient reporting to members, limited internal challenge to decisions, over-reliance on external expertise, and limited capacity and skills. Current practices can cause concern locally: we received a striking range of written evidence alleging apparent problems with governance or transparency of commercial investments. For example: decision-making by very small sub-sets of the ruling group; cabinet papers or other information supporting purchase decisions that contain limited analysis or are kept confidential well after the purchase has completed; poorly formulated objectives for purchases; not allowing potential purchases to be called in for scrutiny; and placing reliance on advisors with an apparent risk of a conflict of interest.**

[7] Summary, para 19.
[8] *Local authority investment in commercial property (Eleventh Report of Session 2019-21), HC 312*

49. In cross-examination, Mr Clark strenuously denied that the practice of borrowing copious sums for the purpose of making investments amounted to borrowing "more than or in advance of" need, apparently on the basis that it was permissible to borrow in order to make "capital investments". It may be that this alluded to the new Investment Strategy approved in October 2017 which had sanctioned the re-classification of cash investments as "capital expenditure". He also asserted that auditors had found that the Council's borrowing and investment policy was "compliant" and that it had "done nothing wrong". One apparent consequence of Mr Clark's stated understanding is that, neither in the October 2017 Strategy nor, seemingly, in any later iteration, is there any statement pursuant to the April 2018 Statutory Guidance, para 47 (cited above) (or any later iteration) explaining why the Council did not adhere to the Prudential Code and/or specifying steps taken to manage the resulting risks.

50. In his (open) witness statement (at para 42(n)) Mr Clark stated that Rockfire had "always paid the bond coupon in full and on time" but in cross-examination he agreed that it had failed to make a payment of £12.5m in February 2022. He explained that the erroneous remark (which he acknowledged to be arguably misleading, his statement being dated 13 June 2022) had arisen because, in writing it, he had been directing himself to the period up to July 2020.[9]

51. Mr Clark also accepted in cross-examination that two companies in the Toucan group of companies, Rockfire Investment Finance Plc and Toucan Bond Co 19 Ltd, which had issued a very large proportion of the bonds taken out by the Council in and after 2016 (including the initial investment referred to in the 2016 mid-year report mentioned above)[10], had gone into liquidation. He went on to express confidence that the Council's capital (itself, as mentioned, raised by borrowing from other local authorities and attracting interest liabilities accordingly) would be recovered, stating that new management in the Toucan group was working with the Council to achieve that objective. But he did not say or suggest that any enforceable security could be relied upon.

52. In May 2020 several news stories broke concerning local authority borrowing and investment practices. These were authored by Mr Davies and another journalist and published under the auspices of the Bureau of Investigative Journalism. The stories gave particular prominence to the Council and its investments in renewable energy companies, most notably Rockfire. They included the following allegations.

- The Council had borrowed from 150 different local authorities.
- The loans were not used to fund services or invest in infrastructure.

[9] In fairness to Mr Clark, it is clear that his statement, para 42 largely reproduces a section of his report prepared for an Extraordinary Meeting of the Council held on 8 July 2020 (Documents Bundle, pp826-7).

[10] It was put to Mr Clark in cross-examination that these accounted for 85% of the Council's investments. He did not challenge the number but we do not think it would be fair to assume that he accepted it as entirely correct. But he certainly did not quibble with the proposition that the proportion was substantial.

- The loans were used to invest in solar farms "100 miles away".
- The Council's overall borrowing had reached £1bn.
- The former leader of the opposition Labour group had claimed that the Council had not been transparent with members or the public about its investment activities.
- At the time when the original £15m investment in Rockfire was announced (2016) the Council had actually invested £34m.
- The total invested by the Council in Rockfire might have reached £420m.
- The total invested by the Council as at 2018/19 in renewable energy projects was £702m.
- The Council's authorised borrowing limit for 2018/19 was exceeded.
- There was doubt as to whether the solar farms owned by Rockfire represented adequate security for the sums advanced by the Council (and, to a far smaller extent, several other authorities), taken together with Rockfire's other debts (the company's total indebtedness was said to stand at £660m).
- The Council had made no public disclosure of its investments in the renewable energy sector since 2016.
- The Council had refused FOIA requests directed to its borrowings and investments from 2016 onwards.

53. In 2020 the Council took the decision to discontinue (Mr Clark's word was "unwind") the strategy adopted in October 2017. His evidence on that abrupt change of course was not wholly clear, but our understanding is that it happened soon after May 2020 and as a direct result of the adverse publicity to which we have just referred. As we have noted, the leader of the opposition group had been reported in the May 2020 news stories as passing comments critical of the strategy and the perceived lack of transparency in the way in which it was implemented. It is not for us to form any view about these different perceptions.

54. Mr Clark told us, and we accept, that the strategy of borrowing to invest simply ceased after the decision to "unwind". There were no more investments made under it save for, as he put it, "a couple of small ones" to which the Council was already committed when the decision was taken.

55. But, of course, the decision left the Council with a large portfolio of investments and, no doubt, a commensurately large volume of debt.

56. On 14 April 2021, following a lengthy trial in October and November 2020, Henshaw J, sitting in the Commercial Court, delivered a reserved judgment in the case of *Toucan Energy Holdings Ltd & another v Wirsol Energy Co Ltd & another* [2021] EWHC 895 (Comm) in which he made withering findings about the credibility of Mr Liam Kavanagh, the ultimate owner of the First Claimant, a company in the same group of companies as Rockfire, and of Mr Steven Croucher, Chief Operating Officer of Rockfire from March 2017 to January 2018

(paras 96 and 99 respectively). The learned judge also found that Mr Kavanagh had pursued an argument concerning a particular refinancing transaction which was baseless and he knew to be baseless (para 743) and that the Claimants had advanced a groundless claim for recovery of a payment of £5m made in favour of Rockfire, and so ultimately for the benefit of Mr Kavanagh (as an "arrangement fee" in respect of the refinancing transaction), without producing any evidence that the payment was anything other than a means of enabling Mr Kavanagh to extract money from the transaction (para 756).

57. On 2 September this year, the Department for Levelling Up, Housing and Communities issued a press release in the following terms:

> **Local Government Secretary Greg Clark has today (2 September 2022) announced measures to intervene in Thurrock Council to address serious concerns about the financial management of the council and the risk this poses to local services.**
>
> **Essex County Council has been appointed in the role of the Commissioner and Best Value Inspector, giving them full control of the financial functions of Thurrock Council. …**
>
> **Thurrock Council will work with Essex County Council to prepare an Improvement Plan within the first 3 months of the intervention and is expected to provide a Best Value Inspection Report to the Secretary of State in the same timeframe.**
>
> **The move comes in response to grave concerns about the exceptional level of financial risk and debt incurred by the council.**
>
> **Local Government Secretary Greg Clark said:**
>
> **Given the serious financial situation at Thurrock Council and its potential impact on local services, I believe it is necessary for government to intervene.**
>
> **…**
>
> **In its role as Commissioner, Essex County Council will take control of all the functions associated with the financial governance and scrutiny of strategic financial decision making by the authority.**
>
> **The Best Value Inspection will look into the governance, audit (internal and external), risk management, overview and scrutiny functions of the council, and consider their impact on service delivery.**

58. Also on 2 September, the Leader of the Council, Mr Rob Gledhill, resigned. In a statement, he said:

> **Whilst I welcome this news [of the Government intervention] and the support from Her Majesty's Government it has become clear over the past few months that the situation regarding council investments, and subsequently its finances, has not been as reported.**

> **As Leader of the Council the political buck stops with me and as such it would only be right, and expected, that I resign as Leader of the Council …**[11]

## The Rival Arguments

59. The admirable written submissions of both counsel, which they supplemented by concise oral argument, can be left to speak for themselves. For present purposes, a brief summary will suffice.

*The Appellant's case*

60. Mr Davidson disputed that the exemptions under FOIA, s36(2)(b)(i) and (ii) were engaged. As to those under s36(2)(c) and s43(2), he submitted, without advancing a positive case one way or the other, that it was for the Council to demonstrate that they were engaged.

61. Further and in any event, Mr Davidson submitted that, in relation to all parts of the case, the public interest balancing test lay at the heart of the dispute and that, properly applied, it argued compellingly in favour of disclosure of the information sought. He relied on a number of factors including the importance of the subject-matter of Mr Davies's requests; the Council's fiduciary and other legal duties; the general need for scrutiny of local authority finances and all the more so where, as here, the sums involved and the public risk are high; the fact that the information sought bears upon the propriety of the Council's use of vast sums of public money; the Council's evident failure to act transparently since 2016 and the contrast with its more open conduct up to that year; the matters which have occurred since the requests were made and the light which those matters shed on the transactions to which the requests are directed; and the (as Mr Davies sees it) inadequate protection of the public interest offered by the measures prayed in aid by the Council as sufficient safeguards against risk.

*The Council's case*

62. Mr Coppel submitted that each of the exemptions pleaded was amply made out.

63. Turning to the public interest test, Mr Coppel readily accepted that much of Mr Davidson's argument was well-made. The Council agreed that transparency and accountability in matters of local authority finances were of critical importance. Its fiduciary and other legal responsibilities were not in question. But despite these considerations Mr Coppel submitted that the balance came down against granting the appeal, for two main reasons. First, disclosure would prejudice the Council's existing loans and investments. Second, mechanisms in

[11] We have not invited submissions on the events of 2 September. We simply note the essential facts, which are matters of record.

place, including in particular the audit system, provided adequate protection against risk.

*The Commissioner's case*

64. As we have mentioned, the Commissioner elected not to participate in the hearing before us. In written submissions dated 11 September 2020 she reasoned that the pleaded exemption under FOIA, s43(2) was engaged and that, while the matter could be argued both ways, the public interest favoured maintaining the exemption. A similar analysis was offered in supplemental submissions of 8 June 2021 directed to the s36(2)(b) and (c) exemptions. In crude summary, the Commissioner's view was that the Council's prejudice-based arguments trumped Mr Davies's appeals to transparency and accountability.

**Analysis and Conclusions – Majority View**

65. In this section of our reasons, 'we' refers to the majority consisting of Judge Snelson and Dr Gasston and related pronouns are used accordingly.

*The exemptions*

66. It was not in question that Mr Hallam was a 'qualified person' for the purposes of s36.

67. Resolute under cross-examination, Mr Hallam persisted with the argument that s36(2)(b) was engaged. We do not question the sincerity of his evidence on this aspect, but we do find, with respect, that his opinion is unreasonable to the extent that it falls well outside any range of reasonable points of view open to him. We simply do not see any good reason why release of the disputed information would or might give rise to any appreciable risk of prejudicing free and frank provision of advice or exchange of views for the purposes of deliberation. Much of the information is quite anodyne (names of lenders or creditors, sums advanced or borrowed etc). As we will observe, some (relating to interest rates and forecast returns) is sensitive. But we see no sensible reason for thinking that putting *any* of it into the public domain might inhibit the Council's advisors from advising freely and frankly or the Council from freely and frankly sharing information or opinions with advisors and others in the course of deliberating on financial strategy or individual financial decisions. Mr Hallam sounded the familiar warnings about "chilling effects" (as 'qualified persons' so often do), but we were unable to make sense of them in the context under consideration. If anything, it seems to us that knowledge that information of the sort requested by Mr Davies would or might be made public would not diminish, but increase, the care and candour of the Council and its advisors in their exchanges about relevant financial transactions. The Council entirely fails to make out a risk that is, to quote *Hogan*, real, actual or of substance.

68. Turning to s36(2)(c), we have arrived at the marginal conclusion that the engagement is engaged in relation to the entirety of the two requests. For reasons more fully given below in addressing the s43(2) exemption there is, we think, much to be said for the view that s36(2)(c) is engaged only in relation to the requests identified in our substituted decision notices, paras 1(i)(b) (directed to interest rates on lending and borrowing transactions) and 2(i)(b) (directed to forecast returns on investments). But on balance we do not feel able to say that Mr Hallam's opinion that the exemption is fully engaged, certainly on the basis of "likely" (as opposed to actual) prejudice, is impermissible. The reach of s36(2)(c) is much wider than that of s36(2)(b) and we are mindful of the importance of according due respect to any opinion of a 'qualified person'.

69. Turning to the commercial interests exemption under s43(2), we remind ourselves that here it is for us to determine the question of engagement, rather than measure a third party's opinion on that question. In relation to large parts of both requests, that distinction is critical. In arriving at our view, we have been careful to focus on the two requests before us, something which Mr Clark in his evidence seemed notably loath to do. (It was hard to avoid the sense that his real concern was less about the specific requests and more about the pernicious effects (as he sees it) of general media intrusion into the affairs of the Council and the risk of more if the appeal succeeds.)

70. We are not persuaded that publication of the information sought, other than that relating to interest rates and forecast returns, would, or would be likely to, prejudice the commercial interests of the Council or any relevant third party. In particular, we see no, or at most very little, commercial sensitivity in the identities of the parties with whom the Council has entered into borrowing, lending and investment transactions, the general nature of those transactions, the sums involved, the duration of the various contracts, the forms of finance employed and, in the cases of investments, the sources of information which led the Council to enter into the relevant transaction with the party concerned. The fact that the Council and, no doubt, some – perhaps most – of the contracting parties, would prefer this information to be suppressed is plainly not, by itself, a reason to hold that the exemption is engaged. The evidence does not, in our view, bridge the substantial gap between an unfulfilled preference or even expectation of privacy and real, actual and substantial prejudice to commercial interests.

71. We do, however, take a different view in relation to the interest rate and forecast returns information. Here we accept that the relevant information was commercially sensitive and disclosure when requested might well have prejudiced the Council and/or any affected third party. Publication of a particular interest rate might, for example, have given a competitor an unfair advantage in the borrowing and/or lending market. And publication of forecast returns on investments would have been liable to involve revealing (implicitly if not directly) key terms of investment transactions entered into by the Council

up to the date of the request. In our judgment the interest rate and forecast returns information was plainly within the reach of s43(2) and its release at the time of the requests (or strictly the refusals which promptly followed them) would have been likely to cause commercial prejudice to the Council and/or the entities with whom it entered into the various relevant transactions. An important factor behind this assessment is the temporal proximity between the requests and the transactions to which they related. It is a statement of the obvious to say that, as time passes, the terms of any commercial transaction are likely to become ever-less sensitive. Our decision that s43(2) is, to a limited extent, engaged should not be taken as implying any view as to whether later requests in the same terms would have merited a similar finding.

72. Our view that s43(2) is engaged in relation to the interest rate and forecast returns information rests on the open evidence. It is supported by some evidence given in closed session but that evidence merely reinforced the open evidence on which we rely. In the circumstances, we see no need to produce a closed annex referring to closed evidence.

*The public interest balancing test*

73. It is convenient to start this part of the analysis by considering the public interest for, and against, disclosure of the interest rate and forecast returns information. Here we are persuaded that the balance comes down in favour of maintaining the exemptions under ss36(2)(c) and 43(2). We see limited public interest in the granular detail of interest rates charged and projected returns on investments, particularly in circumstances where disclosure of that information, in the absence of a considerable amount of contextual detail, would be unlikely to shed light on whether any particular borrowing or lending or investment transaction was competent or prudent. Moreover, there is plainly a strong public interest in protecting commercially sensitive information which, if carelessly released, may distort or unbalance markets and cause harm to, among others, innocent third parties, their shareholders and employees and wider interests beyond. Having measured the genuine risks associated with disclosing the interest rate and forecast returns information against the possible benefits of doing so, we are in no doubt that the public interest favours maintaining the exemptions.

74. As to the balance of the requests, we are equally clear that the public interest favours disclosure. We have a number of reasons for our view.

75. First, the Council has weighty legal and constitutional responsibilities. It owes fiduciary duties to its residents to manage its funds, raised through the council tax, for their best advantage (*Bromley LBC v GLC* [1983] 1 AC 768 HL). There is a powerful public interest in ensuring that local authorities abide by their fiduciary and statutory duties.

76. Second, there is an equally powerful public interest in public authorities (all the more so bodies with fiduciary duties) being open about their activities and accountable for them. And if there is not sufficient transparency, the principle of accountability will count for little since the public will not have sufficient material on which to assess whether the body has lived up to its responsibilities and, if not, how to hold it to account.

77. Third, the wholly exceptional scale of the Council's financial dealings argues compellingly in favour of disclosure. Mr Clark's contention to the very opposite effect bordered on the absurd. Its activities are a matter of special public interest not only locally but nationally. It is plain to us that, on the most unusual facts of this case, there is a particularly strong public interest in disclosure of all relevant information save in so far as such disclosure is countermanded by an even more compelling prejudice-based factor to the contrary.

78. Fourth, there is, as a matter of general principle, a public interest in the confidentiality of commercial transactions being respected (see *Dept of Business, Innovation & Skills v Browning*, FTT, 22 September 2011). But the strength of the public interest will inevitably vary from case to case. It seems to us that, in the context of an inquiry about the commercial activities of a public body, confidentiality should be seen as strongly favouring the public interest to the extent that it serves to protect genuinely sensitive commercial information or for some other similarly compelling reason. Confidentiality of information that does not fall into these categories must, we think, weigh less in the public interest balance. As we have stated, we consider that the information sought, other than the interest rate and forecast returns information, is not commercially sensitive and does not merit protection on any other special ground. Finally on the subject of confidentiality, we take account of the fact that all entities entering into commercial agreements with the Council must be taken to have understood that confidentiality clauses they contained were inevitably subject to FOIA.

79. Fifth, we are not persuaded by Mr Clark's evidence about risks which might arise in relation to certain investments which (to use his language) have been "unwound". He told us in his open evidence that there were ongoing difficulties (which the Council was confident of overcoming) involving possible re-financing arrangements in respect of at least one company in which the Council had invested. He supplemented his open evidence on this subject in closed session. What he did not convey to us (in open or closed evidence) was any intelligible ground for apprehending that disclosure of the information sought, less the interest rate and forecast returns information, would or might cause prejudice to the Council's current dialogue with the company or companies concerned. Moreover and in any event, our focus must be on the public interest balance at the time of the Council's refusal of the second request. As Mr Clark confirmed to us, the difficulties on which he relied arose much later.

80. Sixth, Mr Coppel placed strong reliance on the statutory audit provisions, arguing that these serve the interests to which Mr Davies's requests are directed. We agree with Mr Davidson that this part of the Council's case misses the point. The audit scheme is designed to provide a degree of independent professional oversight of local government finances. It is not primarily concerned with transparency. Indeed, as Mr Coppel notes (see above), it includes a provision which explicitly subordinates the interests of transparency to those of commercial confidentiality (the 2014 Act, s26(5)).[12] And the right to raise objections at audit is narrowly circumscribed, being limited to local government electors for the area to which the accounts under audit relate (*ibid*, s27(1)). In short, the audit scheme is not to be seen as part of the freedom of information machinery: it serves a different purpose. The fact that it exists does not materially assist us in answering the questions which this FOIA appeal raises and in particular the resolution of the public interest balance.

81. Seventh, Mr Coppel also prayed in aid two other forms of oversight, the existence of which, he maintained, served to tip the public interest balance further in the Council's favour. First, he relied on the scrutiny of financial decisions by elected councillors. We respectfully disagree with Mr Coppel. We heard from his own witness, Mr Clark, that this "scrutiny" consisted mainly[13] of private, unminuted, undocumented meetings from time to time in which he briefed the leaders of the three political groups on financial plans and/or developments. We were not even told on what dates these meetings happened or (even in broad terms) the subject-matter discussed. We have noted that the leader of the opposition group has alleged publicly that elected members were kept in the dark about what was being done in their name. It was little reassurance to hear Mr Clark comment in evidence that the members were always free to ask more questions, which seemed to suggest a mindset that it was incumbent on him to pass on information only to the extent that councillors pressed him to do so. Mr Clark's worryingly casual attitude to his duty to keep elected members properly informed and limit his executive acts to steps for which they had given full and informed consent reinforces our view that Mr Coppel's first point takes the Council's case on the public interest balance nowhere.

82. Mr Clark also mentioned in his evidence that a report on the Council's borrowing, lending and investment activities would be forthcoming in due course. Again, the Council's case on the public interest balance derives no assistance from this. We were shown no document substantiating any plan to write a report, let alone one identifying the person responsible for drafting it or defining its proposed scope or purpose or stating whether, and if so, when and how, it was to be published. If there was some plan one day to write a report it

[12] Unless there is an "overriding" public interest in disclosure. There seems to be no legal remedy for an interested person disposed to challenge an auditor's decision to suppress information on commercial confidentiality grounds.

[13] Understandably, Mr Coppel did not place reliance on "scrutiny" through wider Council processes such as Cabinet governance and the work of the specialist Committees. There was no suggestion that these bodies had access to information about the terms on which borrowing, lending and investment transactions were negotiated or about the parties and sums involved.

has probably been superseded by the events of 2 September and the steps now underway in Essex County Council to prepare the 'Best Value Inspection'. In any event, there was no suggestion that a plan to write a report had been conceived at the time when the requests were refused.

83. Eighth, we have noted the change in the Council's approach to disclosing its borrowing, lending and investment activities over time. As we have recorded, it was quite willing in 2016 to disclose its investment in the renewable energy sector and to name Rockfire and state the sums involved. We find Mr Clark's attempts to explain the secretive position which the Council now adopts less than convincing. We cannot avoid the sense that it stems in material part from a wish to avoid the embarrassment which public scrutiny of its remarkable financial activities would be likely to involve. The exemptions from the right to freedom of information must not be invoked as a means of sparing public bodies and their employees discomfort of this sort.

**Analysis and Conclusions – Minority View**

*Exemptions*

84. Mrs Tatam agrees with the majority that the exemptions under s36(2)(b)(i) and (ii) are not properly applied to any part of either request, and that under s36(2)(c) is properly applied to the entirety of both requests.

85. On s43(2), Mrs Tatam parts company with the majority, taking the view that there was a real, actual, substantial risk of prejudice resulting from disclosure of any of the information sought by either request. She sees both requests as detailed and wide-ranging in scope. She considers that publication of the identities and other details regarding public authorities, organisations and companies with which the Council has transacted would inherently be harmful to its and their commercial interests, or at least that such prejudice would be "likely". Further, she believes that public discourse on the Council's activities in the Inter Authority Lending Market (generated by media reports and the like) have demonstrated evidence of the risk of harm, and impaired its ability to raise funds in that way, and that disclosure of the information sought by Mr Davies would further weaken its position and prejudice the interests of the residents it exists to serve.

*The public interest balancing test*

86. Mrs Tatam takes the view that the public interest in maintaining the exemptions narrowly outweighs the public interest in disclosure. She agrees that the legal and constitutional responsibilities of local authorities are important, and disclosure of the requested information could support the public interest in exploring, for example, the extent to which the Council adhered to its stated aim of compliance with the CIPFA Prudential Code in protecting the security and

liquidity of investments. She affirms that the principles of transparency and accountability at the heart of the FOIA jurisdiction must be safeguarded, as too the benefits of detailed and granular scrutiny of data. But against the prejudice likely to result from disclosure, she sees little prospect of a counterbalancing public benefit here. She regards the requests as intrusive and potentially harmful, but also doubts that provision of the information sought, in addition to the information already in the public domain, would significantly serve the objectives of scrutiny and public accountability which Mr Davies proclaims. She makes four further points.

87. First, the powerful public interest in the confidentiality of commercial transactions extends not only to commercially sensitive data but also to wider privacy interests inherent in such financial transactions. The Council entered into agreements with third party organisations on the basis that the confidentiality clauses meant that details would remain private unless the public interest balance under FOIA exemptions provided for their publication. Entities thus had reasonable expectations that details of their transactions would remain private. In these circumstances, disclosure would be likely to result in public authorities and third party commercial organisations having a reduced appetite for entering into dealings with the Council (or other public authorities) in the future. That reduction in appetite would tend to restrict choice and competition, thereby prejudicing the market in which such dealings occur to the disadvantage of all concerned, including the Council and, by extension, the residents of Thurrock.

88. Second, Mrs Tatam was persuaded by Mr Clark's evidence about likely prejudice to the position for one or perhaps two companies in which the Council has invested, with regard to their restructuring and refinancing. She is satisfied that he described a risk of harm that was and is real, actual and of substance. And she judges that the risk would have arisen whether or not the difficulties of the relevant company (or companies) had become clear prior to the dates on which the two requests were refused.

89. Third, Mrs Tatam is influenced in the assessment of the public interest by the oral and written evidence, and Mr Coppel's submissions, concerning existing and alternative avenues for public knowledge on the Council's strategies. She considers the elected Members were fully behind the Council's investment and borrowing strategies at the relevant time, and that the reports and minutes of Full Council meetings and of Committees enabled residents and other members of the public to assess the strategies being conducted. She sees force in his points concerning the audit system, the scrutiny of audit reports by elected Council members, and the opportunity for taxpayer involvement. She concludes that disclosure of the information sought by Mr Davies would add only a little of public benefit.

90. Fourth, Mrs Tatam does not share the perception of the majority that the Council's resistance of the appeal appears to be driven in part by a desire to avoid embarrassment, but is cognisant of the concern that adverse publicity may have on prospective financial dealings.

**Disposal**

91. The majority view prevails. The appeal succeeds to the extent stated in our Decision above.

(Signed) Anthony Snelson

Judge of the First-tier Tribunal

Dated: 14 October 2022

Amended: 19 October 2022