

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

### **Decision notice**

**Date:** 2 March 2020

**Public Authority:** Homes England

**Address:** Windsor House  
50 Victoria Street  
London  
SW1H 0TL

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

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1. The complainant has requested information from Homes England about the Empty Homes Grant Programme, administered by the former Homes and Community Agency.
2. Homes England disclosed most of the information falling within the scope of the request but withheld a small amount relating to assessment parameters under section 43(2) of the FOIA – commercial interests.
3. The Commissioner's decision is that Homes England has correctly engaged section 43(2) and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

## Request and response

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4. On 23 April 2019 date, the complainant wrote to Homes England and requested information in the following terms:

*'FOI to Homes England for copy of HCA's 2012 local review and National moderation of Rossendale Borough Council's 2012 Bid, for empty homes 2012 to 2015 delivery round 1'*

5. For clarity, the The Homes and Communities Agency (HCA) was an executive non-departmental public body, sponsored by the Department for Communities and Local Government. It was replaced by in January 2018 by Homes England and the Regulator of Social Housing.
6. Homes England (HE) responded on 22 May 2019, supplying some information within the scope of the request but withholding the remainder citing section 43(2) of the FOIA – commercial interests.
7. The complainant requested a review of the response on 17 June 2019, and HE provided the outcome of its review on 8 August 2019. It had identified some new information falling within the scope of the request, which it disclosed, and reversed its decision for some of the previously withheld information. However it still withheld information, maintaining its reliance on section 43(2).

## Scope of the case

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8. The complainant contacted the Commissioner on 22 May 2019 to complain about the way his request for information had been handled. At this point he had not requested HE to undertake a review of its response, and so the Commissioner advised him to do so. After receiving the outcome of the review, the complainant remained dissatisfied at the Council's continued reliance on section 43(2) for withholding some of the information.
9. During the course of the investigation, HE supplied all the documents falling within the scope of the request, save for some limited redactions on the basis that section 43(2) still applied to this information. The Commissioner therefore considers the scope of the case to be whether HE is correct in its application of section 43(2).
10. HE redacted other information in the disclosed documents as it did not consider this to be within the scope of the request. The Commissioner has viewed these redactions and for the sake of clarity, concurs with HE's assessment that this information is out of scope.

## Reasons for decision

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### Section 43(2)-commercial interests

11. Section 43(2) of the FOIA provides an exemption from disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including, but not limited to, the public authority holding it). It is a qualified exemption, which means if the exemption is engaged it is then subject to the public interest test.
12. Section 43(2) is a prejudiced based exemption. The Commissioner's approach to the prejudice test is based on that adopted by the Information Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030, 17 October 2006) (referred to as 'Hogan')<sup>1</sup>. This involves the following steps:
  - Identifying the 'applicable interests' within the relevant exemption
  - Identifying the 'nature of the prejudice'. This means showing that the prejudice claimed is 'real, actual or of substance', and showing that there is a 'causal link' between the disclosure and the prejudice claimed.
  - Deciding on the 'likelihood of the occurrence of prejudice'.

#### *Applicable interests*

13. HE has redacted the following from the disclosed documents:
  - Details of percentage award regarding Rossendale Borough Council's bid to the Empty Homes Grant Programme (EHGP)
  - The percentage tolerance level for bids received i.e. the amount HE would award above the area average.
  - One assessment standard
  - Moderating activity to meet strategic priorities.

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

14. HE has referred to the Commissioner's own guidance on section 43(2):

*'a public authority may undertake commercial activity in order to pursue its own policies. For example, in order to encourage economic development, a public authority may award grants to businesses. It may therefore hold information relating to its assessment of any proposals submitted to it.'*

15. As the withheld information concerns the criteria and parameters for the assessment of bids for the awarding of grants to reduce the number of empty homes, the Commissioner is satisfied that this is commercial in nature, and therefore constitutes the applicable commercial interest of HE.

*Nature of the prejudice*

16. HE has argued that the EHGP operates on a competitive bidding process, which relies on grant applications being made and awarded for the *minimum* amount required by bidders to bring empty homes back into affordable housing. This ensures that the amount awarded is not above the level required, thereby protecting the public resources awarded by HE. Publication of the parameters through a FOIA request would enable bidders to tailor their bids to secure the maximum amount available, rather than the minimum required to bring the properties back into use.
17. HE has acknowledged that the Empty Homes Programme 2012-15, of which this grant programme forms a part, is historic and that therefore the passage of time would have reduced the commercial significance of the information. However, it continues to provide grant funding for empty homes by way of its Shared Ownership and Affordable Housing Programme (SOAHP) which also operates on a bidding process. HE states:

*'The policy for assessing bids has been developed over time and remains the same under current live programmes as it did under the programme subject to the request. In this case, therefore, the historic nature of the information withheld does not make it less likely to prejudice the commercial interest of Homes England.'*

18. As the withheld information contains details of assessment parameters that are still in use for HE's SOAHP, the Commissioner accepts that there is a causal link between the disclosure and resulting maximum grant bidding that therefore the prejudice anticipated is real. The information would, or would be likely to, provide advantage to bidders to the detriment of HE's commercial activities.

*Likelihood of the prejudice*

19. Having established that disclosure of the withheld assessment parameters would prejudice HE's commercial interests, the next stage is to identify the likelihood of the prejudice occurring.
20. In the Hogan case, the Tribunal said: "*there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.*" (paragraph 33).
21. The first limb identified relates to 'would'. 'Would' is therefore taken to mean more probably than not i.e. more than a 50% chance of disclosure causing the prejudice. This does not mean that HE has to show it that it will definitely happen, but that the chain of events is so convincing that it is clearly more likely than not to arise.
22. The second limb identified relates to 'would be likely'. This means that there must be more than a suggestion or hypothetical possibility of the prejudice occurring, so although the probability is less than 50%, it is still a real and significant risk. This interpretation was relied on by the Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006<sup>2</sup>), who said "*We interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk.*"
23. The threshold of likelihood that HE is relying on in this case is 'would be likely to' – more probable than not. It believes that a release to the world at large under the FOIA would enable bidders to use the assessment parameters to structure their bids that leads to more funding than actually required. This would have a prejudicial affect on HE's commercial interest.
24. The issue for the Commissioner to consider is not how likely bidders are to access this information, but how likely they are to use it assuming that they have access. The withheld information provides the percentage margin for acceptable bids, as well as how bids might be

brought within range. Bidders are wanting to secure the highest amount of funding to increase the number of homes that can be brought back in to affordable housing use, and their priority will be to maximise any funding available. The Commissioner therefore accepts HE's assertion that the chance of this happening is more likely than not and therefore disclosure of the information *would be likely* to prejudice its commercial interests. Section 43(2) is therefore engaged.

#### *The public interest test*

25. The exemption under section 43(2) is subject to the public interest test. This means that, even when a public authority has demonstrated that the exception is engaged, it is required to consider the balance of public interest in deciding whether to disclose the information. The public interest is not a tightly defined concept, and can cover a range of principles including, but not limited to: transparency and accountability; good decision-making by public bodies; upholding standards of integrity; ensuring justice and fair treatment for all; securing the best use of public resources and in ensuring fair commercial competition in a mixed economy.

#### The Complainant's view

26. The complainant is concerned about the lack of transparency offered by HE in figures associated with the EHGP. He has drawn HE's and the Commissioner's attention to a range of figures made publicly available by various bodies about the grant, including lease and repair costs for empty properties, and consequently does not consider that the review, assessment and moderation of applications to the programme can contain commercially sensitive information. He is particularly concerned about the absence of any information about match-funding in the figures available and any role this played in the assessment and moderation process of applications.
27. The complainant makes reference to the 'problems' experienced by the Council in implementation of the programme, which support the public interest in disclosure. Rossendale Borough Council had agreed to co-ordinate the scheme on behalf of a consortium of Councils, and a private company was appointed to manage it. However, the company collapsed and ownership of the scheme returned to the Council. An independent audit report of the scheme highlighted serious problems with the management of scheme, costing the tax payer millions of pounds and a police investigation into the matter remains ongoing.

#### HE's view

28. HE recognises the need to transparency and accountability in the delivery of its grant programmes, and accepts that providing information

can enable the public to challenge decisions made by public bodies. It also accepts that the grant programme at the centre of this request is now closed and therefore the sensitivity of the commercial information can be legitimately questioned.

29. However, although this specific grants programme is now closed, the assessment parameters and moderation criteria contained within HE's policy, some of which has been withheld, are still used in its current grant programme SOAHP. The information therefore still concerns live issues and HE does not consider it is in the public interest to jeopardise its *'duty to ensure that bids for grant funding are correctly made, are limited to the minimum amounts required and are properly assessed'*.

The Commissioner's view

30. The situation regarding the Council's mismanagement of the scheme on behalf of the consortium and resultant problems is significant and the Commissioner accepts that the concerns raised by the complainant about the programme are real and genuine.
31. However, when considering the specifics of the withheld information, she is not convinced that this relates directly to the issues of poor management and the ensuing problems faced by the Council. The Commissioner notes that almost all of the information held falling within the scope of the request has been disclosed either at review stage or during the course of this investigation, save for the small amount showing some of the assessment parameters and moderation criteria. HE has withheld this as it is still used within its policy of assessing current grant applications for its SOAHP. The Commissioner therefore concludes that in this case, the public interest in protecting HE's duty to safeguard value for money in its grants programme outweighs the public interest in transparency and consequently it is entitled to rely on section 43(2) to withhold the assessment parameters.

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

33. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Andrew White**  
**Group Manager**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**