

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 May 2020

Public Authority: Buckinghamshire Council
Address: The Gateway
Gatehouse Road
Aylesbury
HP19 8FF

Decision (including any steps ordered)

1. The complainant requested from Wycombe District Council (the Council), which has since been replaced by the new Buckinghamshire Council, information relating to the Housing Infrastructure Fund (HIF) award regarding Princes Risborough. The Council refused the request under section 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that the Council correctly applied section 43(2) of the FOIA. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Background

3. The HIF is a government capital grant programme for new physical infrastructure which aims to unlock sites in the areas of greatest housing demand, and help to deliver new homes in England. The request is for the contract terms and conditions relating to this award regarding Princes Risborough.
4. Although the complainant had submitted his request for information to Wycombe District Council, five councils have since merged into one council; Buckinghamshire Council. This decision notice is therefore served to Buckinghamshire Council and not to Wycombe District Council.

Request and response

5. On 29 July 2019 the complainant wrote to the Council and requested information in the following terms:

"I have a query and I wonder if you could advise. The £12m HIF award regarding Princes Risborough, can you advise the contract terms and other conditions that are associated with this award please."
6. On 5 September 2019 the Council responded and said that it had considered the request under the Environmental Information Regulations 2004 (EIR) and withheld the information under regulation 12(5)(e) (commercial confidentiality).
7. On 6 September 2019 the complainant asked the Council for an internal review.
8. On 9 September 2019 the Council responded. It explained that *"once the HIF award is on a contractual basis – anticipated to be within a month or so, we will be able to consider a more full disclosure."* The Council directed the complainant to a link to a special cabinet report which contains a summary regarding funding for Princes Risborough relief road, and information relating to the HIF funding. The Council did not state whether or not it maintained the citing of regulation 12(5)(e) of the EIR.
9. On 20 September 2019 the complainant stated his dissatisfaction with the response and said that the Council had not provided the detail on the terms and conditions of the HIF award as originally requested.
10. On 22 November 2019 following a conversation which the Council had with the complainant, it provided him with a link to information that, whilst not within the scope of the request, it believed may be of interest to the complainant and informed him that after the General Election the Council should be more publicly forthcoming.

Scope of the case

11. The complainant contacted the Commissioner on 25 November 2019 to complain about the way his request for information had been handled. Specifically, the complainant disputed the Council's refusal to provide the information requested. He said that although the Council had informed him that the full terms and conditions of the HIF award had been agreed, he considered that the Council had used the impending General Election as an illegitimate reason for not releasing this information.
12. On 29 November 2019 the Council responded to the complainant with a further reply explaining its decision. The Council advised him that after further review, it had considered his request under the FOIA rather than the EIR. The Council said that it had discussed the matter with Homes England and that the Council decided to withhold the information requested under section 43(2) (commercial interests) of the FOIA. The Commissioner agrees with the Council's decision that the request should be handled under the FOIA.
13. On 17 January 2020 following the ICO's intervention, the Council provided its internal review response and upheld its decision to withhold the information under section 43(2) of the FOIA.
14. On 27 January 2020 the complainant contacted the Commissioner again stating that he remained dissatisfied with the Council's response and its refusal to comply with his request.
15. The following analysis focuses on whether the exemption at section 43(2) of the FOIA was cited correctly.

Reasons for decision

Section 43(2) – prejudice to commercial interests

16. Section 43(2) of the FOIA states that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person, including the public authority holding it. This is a qualified exemption and is, therefore, subject to the public interest test.

17. The exemption can be engaged on the basis that disclosing the information either “would” prejudice commercial interests, or the lower threshold that disclosure “would be likely” to prejudice those interests. The term “likely” is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice would be more probable than not.
18. For the Commissioner to accept that prejudice *would* result, she must be satisfied that this outcome would be more likely than not. The Council clarified that it considered that a disclosure of the information “would be likely” to prejudice its own, and Homes England’s commercial interests.
19. The withheld information consists of detailed information on the HIF award. In full it consists of the following:
 - The terms and conditions of Homes England’s funding agreement with the Council.
 - The Grant Fund Agreement (GFA) concerning the grant spent on the road infrastructure works regarding Princes Risborough between the Council and Homes England.
 - Information relating to negotiations for the road infrastructure works.
20. The Council explained that it had entered into an agreement, which is a legal contract, with Homes England. The agreement contains information relating to negotiations for the road infrastructure works and is a commercial activity between the parties involved. The parties involved include the housing developers, a planning law firm, infrastructure providers, Buckinghamshire Shadow Executive Head of Planning and Homes England. This was a commercial activity as it involves funding awarded to local authorities on a highly competitive basis and the assessing of bids.
21. As a result of the Council’s bid for funding, Homes England has agreed to provide funds to the Council in order to develop the road infrastructure in the area in question. This is with the aim of facilitating future housing development in the surrounding area.
22. The Commissioner accepts on the basis of this reasoning that the information in question is commercial in nature. The next step is for the Commissioner to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.

23. For Section 43(2) to be engaged three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to commercial interests;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the withheld information and the prejudice to those commercial interests; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, meaning whether there is at least a real and significant risk of the prejudice occurring.

24. With regards to the first criterion, the Commissioner accepts that the prejudice envisaged would be to the commercial interests of the parties concerned. Therefore, the Commissioner is satisfied that the first criterion is met. This is not to say that she agrees it will happen; simply that the criterion is met.

25. The Council argued that disclosure of the withheld information would be likely to harm the Council's business and reputation. It stated that the information should be withheld from disclosure as this would be likely to prejudice the commercial interests of both the Council and Homes England. It said that the information forms part of a competitive process and would be likely to compromise the future of the bidding process. Also, the information could reveal financial information which may affect other organisations taking part in the HIF process.

26. The Council considers that the release of the information in relation to one party in a competitive market, would be likely to distort competition, making it a less competitive process. It would be likely to also have a negative impact on future competitive bidding processes. The Council said that this is because interested parties may feel unable to provide all the information requested for fear of disclosure.

27. It also provided the Commissioner with a detailed account of how prejudice would be likely to occur. The Commissioner acknowledges that the Council is in negotiations with developers with land owning interests, to make the development of the Princes Risborough Expansion Area with a number of homes with accompanying infrastructure. The Council (at the time of the request) was preparing a HIF bid to assist in early delivery of parts of the relief road that would help to unlock development. The Council said that *"developers are seeking to minimise the costs that they are required to meet, and therefore are challenging the physical and community infrastructure funding requirements, and questioning the ability of the development to provide these on the grounds that these may undermine the viability of the development."*
28. The Council stated that in relation to its own interests, it believes that the planning and development context is important in considering this matter. The Council said it would be likely to prejudice its commercial interests if the withheld information was disclosed. It explained that disclosure risks providing information to a party or parties that control land that may have an interest in frustrating the homes delivery process in order to maximise longer term financial returns. The Council said that this would expose it to additional costs and expense which could potentially put at risk the HIF funding, which *"would risk significant delay in homes delivery."*
29. The Council consulted with Homes England regarding the information request and the reliance on the exemption. Homes England explained its reasons why it considered that disclosure of the requested information would be likely to prejudice its commercial interests and these were similar to the Council's reasons detailed within this notice. Specifically, Homes England said that the consequences of releasing the information could damage its relationships with partners and put these potential funding allocations at risk. Releasing information that forms part of a competitive process would be likely to compromise the future of the bidding process. It could also reveal financial information which may in turn affect their commercial interests. Homes England is of the view that disclosing information in relation to one party in a competitive market, would be likely to distort competition, making it a less competitive process.
30. The Council had further arguments which were specific to the withheld information, and the Commissioner accepts that the arguments are logical and hold weight. The Commissioner is unable to specifically elaborate upon these arguments within this notice without revealing details about the withheld information itself.

31. Having considered the arguments, together with the withheld information, the Commissioner is satisfied that the Council demonstrated that a causal relationship exists between the potential disclosure of the information being withheld, and the prejudice to its and Homes England's commercial interests. Therefore, the Commissioner considers that the second criterion has also been met.
32. Turning to the third criterion, the Council said that the consequences of releasing the information would be likely to damage Homes England's relationships with partners and put potential funding allocations at risk. The Council argued that this could therefore "*put potential homes in jeopardy.*"
33. The Commissioner has considered these details and she believes that the Council has clearly demonstrated that the disclosure of the information, would be likely to have a detrimental impact on its commercial activities; specifically, that loss of revenue would be likely to occur through a wider loss of confidence in its ability to discuss such projects confidentially at an early stage. The Commissioner accepts that this would be likely to prejudice the Council's commercial activities in this area.
34. In light of the Council's submissions, the Commissioner agrees that Homes England would expect that the discussions with the Council would be confidential. There is a risk that disclosing this information could affect the Council's ability to maintain and form partnerships with other external organisations. It also risks its future commercial and business possibilities in this area, if information of this sort is disclosed at too early a stage in the process.
35. In this case, disclosure of the withheld information would also be likely to compromise the Council's relationship with Homes England. Specifically, Homes England has stipulated in its correspondence to the Council, that the withheld information should not be disclosed. The Commissioner understands the Council's argument that it would be likely to damage the Council's reputation should the withheld information be disclosed.
36. Having viewed the withheld information and considered the arguments made, the Commissioner accepts that prejudice to the commercial interests of the Council and Homes England would be more likely than not to result through disclosure of the information in question. She therefore finds that disclosure would result in prejudice to the commercial interests of both the Council and Homes England and, on this basis, section 43(2) of the FOIA is engaged.

Public interest test

37. Having found that the exemption is engaged, the Commissioner has gone on to consider the public interest factors in favour of disclosing the withheld information and of maintaining the exemption. Although the Commissioner has found the section 43(2) exemption is engaged, the information may still be released if the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Public interest arguments in favour of disclosing the withheld information

38. The complainant argued that this matter is of great interest to the public and the local community, and he said that the HIF award is "*public money that is going into a 'relief road' that the local community do not want, to satisfy a local plan that is not viable.*" In support of this statement he referred to "*a petition signed by c4000 people plus many representations to public consultations*". He reported that developers and the community believe that this is a waste of public money. He also said that the HIF is public money that may never be recovered if the proposed housing developments do not take place.
39. The complainant is of the view that the Council was not open and transparent about this HIF award and that it had been "*continually stalling*". He said that the disclosure of the withheld information is required in order to demonstrate to the taxpayer, how this public money is going to be invested. He further argued that the public have a right to know the full terms and conditions applicable with this fund.
40. The Council agrees that there is a general public interest in promoting accountability, transparency, public understanding and involvement in how both the Council and Homes England undertakes its work and how it spends public money.
41. The Commissioner recognises that there is a significant public interest in disclosure of information concerning housing and road infrastructure works and in the details of the grant awarded for this development. This is a valid factor in favour of disclosure of the requested information of significant weight.

Public interest arguments in favour of maintaining the exemption

42. The Council identified the following arguments in favour of maintaining the exemption:
- "*Risk to the future funding of the development*
 - "*Commercial damage to Homes England*

- *Distortion of competition*
 - *Encouraging inappropriate lobbying*
 - *Inhibiting provision of information in future bidding exercises..."*
43. The Council reiterated its view that: *"On balance it is considered that the risks to the integrity of the homes delivery project, and future such projects, and the public advantages such projects bring outweigh the benefits to the public which might arise from disclosure and therefore the information being requested is being withheld"*.
44. The Commissioner has considered the withheld information and the existing relationship the Council has with Homes England. She also notes that the Council has been transparent about its development plans by publishing a public report which sets out the principles of the funding agreement, and what the funds can be used for.
45. The Commissioner accepts the Council's view that *"public understanding does not depend on a detailed review of the terms and conditions of GFA."* The Council explained that as a local planning authority, it in effect acts as *"scheme promoter for the first phase of the relief road"*.
46. The Commissioner recognises that there is a public interest in preventing prejudice to the commercial interests of the Council. She understands that disclosure of the information could compromise the existing relationship which the Council has with Homes England. There is also a presumption that information which would impact upon ongoing negotiations will be kept confidential until the project is formalised.
47. There is a public interest in protecting the safe space in which projects such as this are initially developed. A failure to protect that safe space risks damaging the party's commercial interests, and as the Council argues in this case, this could lead to a risk to the future funding of the development and could inhibit the provision of information in future bidding exercises.
48. Although the agreement between Homes England and the Council may have been completed, the process of delivering the intended outcome is still ongoing. A disclosure of the information at this point in time, potentially places the delivery of the project at a greater risk than it otherwise would be. The Commissioner recognises this as a valid factor in favour of maintenance of the exemption.

Balance of the public interest arguments

49. The Commissioner accepts that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities. In this case, the information relates to the HIF award regarding Princes Risborough; a subject matter (evident in the petition signed by local people) in which there is a strong public interest.
50. The Council argues that it has already demonstrated its openness and accountability in this case. From viewing the link which the Council provided, the content includes the special cabinet report, which contains a summary regarding funding for the Princes Risborough relief road, with information relating to the HIF funding. Also provided were background notes from the report in relation to the HIF award.
51. Balanced against the public interest in the information being disclosed, there is a public interest in protecting the commercial interest of the Council and Homes England to the project; specifically, in protecting the party's ability to discuss and negotiate the delivery of the project within a competitive market. Where a disclosure of the terms of the agreement is likely to put the aims and objectives of the project, and the interest of the parties within that project, at a greater risk than would otherwise be the case, there is a strong public interest argument that such risk should be minimised in order to protect the commercial interests of the parties concerned.
52. Given the level of likelihood that commercial harm would occur should the information be disclosed, the Commissioner has decided that the balance of public interests currently favours maintaining the exemption.

Conclusion

53. The Commissioner's conclusion is that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, the Council was not obliged to disclose the requested information.

Right of appeal

54. 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.

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. 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

Ben Tomes
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