

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 January 2023

Public Authority: Homes England
Address: Windsor House – 6th Floor
50 Victoria Street
London
SW1H 0TL

Decision (including any steps ordered)

1. The complainant requested various information in respect of a loan awarded by Homes England to Project Etopia, including its full assessment and decision process that led to the award. Homes England refused the request citing regulation 12(4)(e) (Internal Communications) of the EIR and regulation 12(5)(e) (Confidentiality of Commercial or Industrial Information).
2. The Commissioner's decision is that Homes England has correctly applied regulation 12(4)(e) to all information which constitutes an internal communication. However, Homes England has failed to demonstrate that regulation 12(5)(e) is engaged in respect of the remaining information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under regulation 12(5)(e) and referred to in paragraph 26 of this notice to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 4 November 2021, the complainant wrote to Homes England and requested the following information:

"I have noted with great interest the recent announcement that Homes England has awarded £3.6M Loan by way of a Grant to Project Etopia for their 30 houses in Wilburton, East Cambridgeshire.

As an immediate neighbour to the Development and having noted the criteria for securing such grants, I would be very interested to know the full assessment, justification and decision process that led to this award."

6. On 10 February 2022, Homes England upheld its original response of 2 November 2021 to refuse the request on the basis of regulations 12(4)(e) and 12(5)(e) of the EIR.

Reasons for decision

Regulation 12(4)(e)

7. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. Regulation 12(4)(e) is a class based exception so it is not necessary to demonstrate prejudice or harm to any particular interest in order for it to be engaged.
8. However, regulation 12(4)(e) is subject to the public interest test, therefore where the exception is engaged, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the disputed information.
9. The Commissioner notes that Homes England had originally applied regulation 12(4)(e) to all of the withheld information. However, following discussions with the Commissioner, it accepted that some of the withheld information did not constitute an internal communication. It subsequently confirmed that it wishes to withhold the remaining information under regulation 12(5)(e), which is discussed in detail later in this notice.
10. Homes England has applied regulation 12(4)(e) to email chains, a detailed costings document and three cash modelling documents all produced by the public authority.

11. The detailed costings document and the cash modelling documents were attached to the various email chains referred to above. The Commissioner is therefore satisfied that all information withheld under this exception constitutes a 'communication'.
12. Homes England has also confirmed that all of the information withheld on this basis has only been circulated within the organisation.
13. The Commissioner also notes that information contained within some of documents produced by Homes England, is based on figures and information provided by Project Etopia. His guidance in relation to this states:

"...if information from the external communication is later reproduced in a separate internal communication, that separate communication is internal, irrespective of the origin of the content."¹
14. The Commissioner is therefore satisfied that all the documents referred to above constitute an internal communication in line with his guidance in relation to regulation 12(4)(e) and as such the exception is engaged. He has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

15. Homes England acknowledges that regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public.
16. Homes England is also mindful of the public interest in transparency and accountability in how it undertakes its work and how it allocates public money.
17. Homes England also acknowledges that there is an interest from the public in how it makes decisions and considers applications for funding schemes.

¹ [Regulation 1https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/2\(4\)\(e\) – internal communications | ICO](https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/2(4)(e) – internal communications | ICO)

Public interest arguments in favour of maintain the exception

18. Homes England informed the Commissioner that the information was prepared for an internal decision making meeting. The purpose of the meeting was to provide advice, scrutiny and discuss concerns regarding the proposed development lending. The information provides the background to its decision making and whether it should proceed with the loan. It added that releasing this information would not inform public debate as it is focussed on internal discussions and decision making.
19. Homes England considers that it is vital that it has a 'safe space' to assess and deliberate decisions in relation to funding agreements with third parties in a free and frank manner. It further informed the Commissioner that it is responsible for ensuring that a significant amount of public money is allocated to partners effectively, and in a way that best ensures value for money and ensures deliverability.
20. Homes England has further argued that the need for a 'safe space' is strongest when the information relates to a 'live' matter, and has confirmed that in this case, the information concerns internal deliberations that would reveal ongoing contractual milestones, that if not met, would constitute a fundamental default of the contract.
21. Homes England further considers that the disclosure of internal approval decisions would have a 'chilling effect' on its ability to progress with both current and future decisions and discussions regarding funding this scheme. Disclosure would result in a loss of frankness and candour in relation to continuing discussions about a large amount of public money and would damage the quality of those discussions. This in turn, would lead to poorer decision making which would directly affect the spending of public money and decision making in relation to significant infrastructure works that will impact a large number of people. This, it argues, would not be in the public interest as it would prejudice its position in the market as the government's housing accelerator and effectively manage the public funds entrusted to it.

The balance of public interest arguments

22. The Commissioner has considered the arguments both in favour of disclosure and maintaining the exception. He will always attach some weight to disclosure due to regulation 12(2) and the presumption in favour of disclosure.
23. The Commissioner is also mindful of the public interest in transparency and accountability in how a public authority undertakes its work and how it allocates public money.

24. The Commissioner also acknowledges the need for a 'safe space' for internal deliberations and the potential 'chilling effect' of disclosure of internal communications, and considers that the timing of the request is a significant factor when balancing the public interest. He has therefore concluded that as the matter was 'live' at the time of the request, and remains ongoing, that in all the circumstances of the case, the weight of public interest is balanced in favour of maintaining the exception. Homes England was therefore entitled to refuse the above information on the basis of regulation 12(4)(e) of the EIR.

Regulation 12(5)(e)

25. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

26. The Council is relying on regulation 12(5)(e) to withhold the following information which was produced by third parties:

- A structure chart the third party produced for the Council containing the names of directors and shareholders and the shareholders' percentages.
- A brochure produced by the third party for the Council.

27. In his assessment of whether regulation 12(5)(e) is engaged, the Commissioner will consider the following questions:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality required to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

28. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the information was disclosed under the EIR, it would cease to be confidential.

Is the information commercial or industrial in nature?

29. The Commissioner has had sight of both documents and does not accept that the structure chart is commercial or industrial in nature. Additionally, the Commissioner understands that the Directors of Limited Companies and their Shareholdings is information which is publicly available through the Companies House website.

30. The Commissioner does however accept that the brochure is commercial in nature as it relates to the third party's proposed development and its request for a loan.

Is the information subject to confidentiality provided by law

31. The Commissioner also accepts that the information (the brochure) was provided in confidence. The information is clearly more than trivial as it relates to the third party's request for a loan. The circumstances in which the information was provided, would in the Commissioner's view, be sufficient to impose a duty of confidence upon the Council.

Is the confidentiality required to protect a legitimate economic interest?

32. Homes England confirmed the information relates to an ongoing development loan facility in relation to the Home Building Fund. It has argued that if the information were made public it would be likely that public pressure and external factors would detrimentally affect the developer's ability to achieve further approvals and measures necessary to meet their contractual obligations. This could waste a substantial amount of public money already invested.
33. However, Homes England did not contact the third party for its views on disclosure of this information, but considers that disclosure of the disputed information would result in other third parties gaining access to commercially valuable information and this would harm its own ability to achieve good value for public money.
34. Homes England added that disclosure would adversely affect its own future economic interest as future businesses and developers may decline to work with it if they knew it had previously disclosed information supplied to it in confidence. It added that there is a legitimate economic interest in protecting its ability, and that of third parties, to negotiate in current and future commercial agreements.
35. Homes England also considers that disclosure of the information would adversely affect its ability to operate in its own market as it would allow other institutions and competitors to gain an advantage by having sight of decisions being made by Homes England before its decisions are put into effect, thereby improving their market position.

The Commissioner's conclusion

36. As previously stated, the Commissioner accepts that the brochure is commercial in nature, and that it is subject to confidentiality provided by law. However, the Commissioner notes that Homes England did not ask the third party (authors of the disputed information) for its view on the

disclosure of the information, and would point out that where the information was provided by the third party, it is the interests of the third party that are most relevant, rather those of the public authority.

37. Nevertheless, the Commissioner has considered the withheld information and whilst he accepts that such arguments would have merit in respect of the detailed figures and costings supplied by Project Etopia, the Commissioner has already accepted that these should be withheld on the basis of regulation 12(4)(e). He does not however accept that disclosure of the brochure would detrimentally affect the developer's ability to achieve further approvals and measures necessary to meet their contractual obligations.
38. The Commissioner is however, mindful that Homes England has also stated that disclosure would prejudice its own commercial interests. He has therefore considered Homes England's arguments in conjunction with the withheld information.
39. Homes England has argued that future businesses and developers may decline to work with it if they knew it had previously disclosed information supplied to it in confidence. It added that there is a legitimate economic interest in protecting its ability to negotiate in current and future commercial agreements.
40. The Commissioner has considered this argument, and whilst he accepts that such arguments would have merit in respect of the detailed figures and costings supplied by Project Etopia, the Commissioner has already accepted that they should be withheld on the basis of regulation 12(4)(e). He does not however accept that future businesses and developers would decline to work with it on the basis of the disclosure of the brochure produced by the third party.
41. The Commissioner has also considered Homes England argument that disclosure of the information would adversely affect its ability to operate in its own market as it would allow other institutions and competitors to gain an advantage by having sight of decisions made by Homes England. However, having had sight of the withheld information, the Commissioner considers that other than revealing that Homes England asked the third party to produce a brochure, the brochure itself reveals nothing about Homes England decision making process.
42. The Commissioner is not therefore satisfied that disclosure of the Brochure produced by Project Etopia for Homes England, would adversely affect its commercial or industrial interests. The Commissioner therefore finds that Homes England has failed to demonstrate that regulation 12(5)(e) of the EIR is engaged.

Right of appeal

43. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

**Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**