

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 May 2024

Public Authority: Homes and Communities Agency (Homes England)

Address: 50 Victoria Street
Westminster
London
SW1H 0TL

Decision (including any steps ordered)

1. The complainant requested a copy of a tracker spreadsheet held by Homes England, relating to Help to Buy Equity Loans for properties that have undergone an EWS1 assessment¹. Homes England refused to provide the requested information, citing section 40(2) of FOIA (personal information) and section 43(2) of FOIA (commercial interests) as its bases for doing so.
2. The Commissioner's decision is that:
 - Homes England is entitled to rely on section 40(2) of FOIA to withhold some, but not all, of the information it has withheld on this basis.
 - Home England is entitled to rely on section 43(2) of FOIA to withhold some, but not all, of the information it has withheld on this basis.
3. The Commissioner requires Homes England to take the following steps to ensure compliance with the legislation.

¹ <https://www.gov.uk/guidance/check-if-your-home-has-cladding-that-may-need-a-specialist-valuation#the-ews1-form>

- Disclose all of the headings of the columns on the spreadsheet (i.e. all of the information in row 1), with the exception of the staff initials included in the heading of column AB as these can be redacted under section 40(2) on the same basis as the other staff initials on the spreadsheet considered in this notice.
 - Disclose all of the information in columns A-U, X, AB-AE, AH-AI.
4. Homes England must take these steps within 30 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 28 September 2023, the complainant wrote to Homes England and requested information, relating to Help to Buy Equity Loans for properties that have undergone an EWS1 assessment, in the following terms:
- “In your response to RFI4132, you refer to a tracker spreadsheet maintained since 2021. Can you please share the tracker spreadsheet so I can see the information available”.
6. Homes England responded on 25 October 2023 and refused to provide the requested information, citing section 40(2) of FOIA (personal information) as its basis for doing so.
7. The complainant requested an internal review on 25 October 2023. When doing so, they stated, “you could have provided information which does not include personal data while listing the specific data (headings of columns only) you cannot share because you consider it to be personal data”.
8. Following an internal review Homes England wrote to the complainant on 22 November 2023. It maintained its reliance on section 40(2) (personal information) to withhold personal data within the spreadsheet but also cited an additional exemption, section 43(2) (commercial interests), to withhold the remaining information in the spreadsheet, including the headings of the spreadsheet.

Reasons for decision

Section 40(2) – Personal information

9. This reasoning covers whether Homes England is entitled to rely on section 40(2) (personal information) of FOIA to refuse to provide the information Homes England has withheld on this basis.
10. The information withheld under section 40(2) comprises the information within columns M, O, V, W and AF of the spreadsheet, other than the headings of these columns (i.e. the information in row 1 of these columns). The headings have been withheld under section 43(2) of FOIA so are considered separately below.
11. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
12. Section 3(2) of the Data Protection Act 2018 defines personal data as:

“any information relating to an identified or identifiable living individual.”
13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. Homes England considers that the information in columns M, O and V to be the personal data of Help to Buy Equity Loan customers (“Equity Loan customers”). It considers the information in columns W and AF to be the personal data of junior staff at a third party organisation it contracts to assist with the management of the Help to Buy Equity Loan programme (“the Help to Buy Administrator”).
15. The information within column V comprises property addresses. Homes England argues that individual customers can be identified from the addresses using publicly available information such as Land Registry records. The Commissioner accepts that the addresses relate to the Equity Loan customers and that the Equity Loan customers are identifiable from this information. He therefore accepts that the information in column V is the personal data of the Equity Loan customers.
16. Regarding the information in columns M and O, in its submissions to the Commissioner Homes England stated, “Once a customer is identifiable from [the information in column V], it is possible to confirm and infer information about the customer from other information recorded in the

spreadsheet, such as columns M and O". Although the Commissioner accepts that the information in columns M and O relates to individual Equity Loan customers, he does not accept that this is the personal data of these customers as they are not identifiable from this information. As stated in Homes England's own submissions to the Commissioner, the Equity Loan customers are not identifiable from this information without the corresponding property addresses.

17. The information within columns W and AF comprises initials of staff at the Help to Buy Administrator ("the staff members"). The Commissioner accepts that this information is the personal data of the staff members as this information both relates to and identifies these staff members.
18. As the Commissioner has determined that the information within columns M and O is not personal data, the Commissioner's decision is that Homes England is not entitled to withhold this information under section 40(2) of FOIA. He has therefore ordered disclosure of this information at paragraph 3 of this notice.
19. Having determined that the information within columns V, W and AF is personal data, the next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
20. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
21. The Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
22. The Commissioner considers that the complainant is pursuing a legitimate interest and that disclosure of the requested information is necessary to meet that legitimate interest.
23. He has therefore gone on to consider the balance of the legitimate interest in disclosure and the fundamental rights and freedoms of the Equity Loan customers and the staff members respectively.
24. With respect to the information in column V, the property addresses, which is the personal data of the Equity Loan customers, Homes England has stated:

"We do not consider it is within their reasonable expectations that information relating to their redemption of their Help to Buy: Equity Loan would be disclosed in response to an FOIA request. Although Homes England is clear in its communications that it is subject to FOIA, we do not consider that Help to Buy: Equity Loan customers would hold any expectation that information about them as individuals would be disclosed.

Homes England's privacy notice provides information to individuals about how their information will be processed as a Help to Buy: Equity Loan customer. In this notice, we do not explain to individuals that their personal information may be disclosed in response to a FOIA request. We consider that there is very unlikely to be a circumstance in which Homes England can demonstrate a legitimate interest in the disclosure of identifiable customer data in response to a FOIA request."

25. In addition, regarding the consequences of disclosure Homes England stated:

"We recognise that the management of finances relating to one's mortgage and borrowing is a commonly accepted trigger of stress for individuals. We further recognise that the Help to Buy: Equity Loan customers who are the subject of the requested information live in properties that have been considered to be un-mortgageable because of an unsatisfactory fire risk assessment, meaning their properties do not have an adequate level of fire safety. We consider this furthers any stress felt by the customers, and have received reports of the same anecdotally from affected customers. We consider that releasing this information into the public domain would further that distress."

26. The Commissioner agrees with Homes England's assessment that the Equity Loan customers would not have a reasonable expectation that their addresses and/or identifiable information about their equity loans would be disclosed in response to an FOI request such as this and that disclosure is likely to cause them unjustified distress for the reasons outlined above. The Commissioner therefore finds that, with respect to the information in column V, the legitimate interest in disclosure is outweighed by the fundamental rights and freedoms of the Equity Loan customers. The Commissioner therefore finds that Homes England is entitled to withhold this information under section 40(2) of FOIA.
27. With respect to the information in columns W and AF, the staff members' initials, Homes England argues that although this information relates to their professional rather than private life, these staff members

are junior members of staff, “with no responsibility for decision making to the extent that public interest would warrant disclosure”. The Commissioner accepts that these staff members would not have a reasonable expectation of disclosure and considers that with respect to this information, the legitimate interest in disclosure is outweighed by the fundamental rights and freedoms of the staff members. The Commissioner therefore finds that Homes England is entitled to withhold this information under section 40(2) of FOIA.

Section 43(2) – prejudice to commercial interests

28. Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

29. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner considers that 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 the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice, which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

30. Homes England has withheld all of the headings in the spreadsheet (i.e. all of the information in row 1) and all of the information in all columns other than columns M, O, V, W and AF under section 43(2).

31. However, its arguments regarding the application of the exemption in its submissions to the Commissioner relate only to the contents of columns Y, Z, AA and AG.

32. The Commissioner's decision is therefore that Homes England has failed to demonstrate that the exemption is engaged for the following information, he has therefore ordered disclosure of this information:
- the headings (i.e. the information in row 1) of columns M, O, V, W and AF.
 - all of the information in columns A-L, N, P-U, X, AB-AE, AH-AI (including the information in row 1 of these columns).
33. The Commissioner will now go on to consider whether Homes England is entitled to rely on section 43(2) to withhold the information in columns Y, Z, AA and AG. He will consider both the headings of these columns and the rest of the information in these columns.
34. It has not been possible for the Commissioner to include a significant proportion of Homes England's arguments regarding the application of this exemption in this notice, as disclosure of the information in the detail of these arguments may in itself prejudice the commercial interests of Homes England. The Commissioner has nevertheless provided a summary of the main relevant arguments without disclosing this detail.

Does the information relate to a person's commercial interests?

35. Homes England argues that disclosure of the information in columns Y, Z, AA and AG of the spreadsheet would be likely to prejudice its own commercial interests.
36. The term 'commercial interests' is not defined in FOIA; however, the Commissioner has considered his guidance on the application of section 43², which clarifies that: "A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."
37. The withheld information relates to the recovery, by Homes England, of public money loaned in the Help to Buy Equity Loan programme.
38. The Commissioner accepts that the interests in question are the commercial interests of Homes England.

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

The causal relationship

39. The Commissioner will first consider the causal relationship between the disclosure of the headings of columns Y, Z, AA and AG and prejudice to the commercial interests of Homes England, before going on to consider the information contained within these columns other than the headings.
40. Homes England argued in its submissions to the Commissioner that disclosure of the headings of columns Y, Z, AA and AG would prejudice its commercial interests, as “we consider that it will reveal the difference in original value of the loan and the current market value, (...)”. The Commissioner, having considered the information in these headings, does not accept that disclosure of these headings would reveal this information about either any individual property or any group of properties. The Commissioner does not consider that disclosure of these headings would in any way lead to prejudice to the commercial interests of Homes England.
41. The Commissioner’s decision is therefore that Homes England has failed to demonstrate that the exemption is engaged with respect to the headings of columns Y, Z, AA and AG. He therefore finds that Homes England is not entitled to rely on section 43(2) of FOIA to withhold this information. He has therefore ordered disclosure of this information at paragraph three of this notice.
42. The Commissioner will now consider the causal link between disclosure of the information in columns Y, Z, AA and AG (excluding headings) and prejudice to Homes England’s commercial interests.
43. Homes England argues that, “releasing the withheld information would prejudice Homes England’s ability to recover the amount of public money loaned in the Help to Buy: Equity Loan programme and negatively affect Homes England’s negotiating position regarding the value of homes and the value of the equity mortgage”.
44. Although the Commissioner cannot reproduce Homes England’s arguments in full here, the crux of its argument is that disclosure of the information – about how it has valued properties and agreed redemption figures for these type of equity loans in the past – would weaken its position when agreeing future redemptions. This is because customers would be able to use this information to negotiate a lower redemption figure, and this in turn would reduce the amount of equity loan recovered by Homes England.
45. Having considered the withheld information and the full arguments provided by Homes England, which are not reproduced here for the reasons outlined in paragraph 34 of this notice, the Commissioner is

satisfied that a causal relationship exists between the disclosure of the information in columns Y, Z, AA and AG (excluding headings) and prejudice to commercial interests of Homes England. Specifically, prejudice to its ability to maximise the amount of public money recovered from its equity loan customers.

The likelihood of the prejudice occurring

46. Homes England argues that a disclosure of the withheld information "would be likely" to cause the prejudice it has foreseen. The Commissioner has therefore considered whether the chance of prejudice occurring meets the threshold of being a real and significant risk.
47. The Commissioner has considered the commercial interests of Homes England, the arguments it has provided to the Commissioner and the withheld information. He accepts that there is a real and significant risk that disclosure of the information in columns Y, Z, AA and AG (excluding headings) would prejudice its ability to maximise the amount of public money recovered from its Equity Loan customers.

The Commissioner's conclusions

48. The Commissioner has decided that section 43(2) is engaged by the information in columns Y, Z, AA and AG (excluding headings). Since it is a qualified exemption, he must therefore go on to consider the public interest test required by section 2 of the Act with respect to this information.

The public interest

49. The test, as set out in section 2(2)(b), is whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".
50. Homes England took into account the following public interest arguments in favour of disclosing the information:
 - "Openness and transparency in decision making relating to valuations and the amount of equity loan recovered."
 - "Fairness in treating home owners equally and being transparent about it."
 - "Openness in recovery of public money."
 - "Public interest in the management of a significant amount of public money and in the accountability of decisions that are taken which affect public services and public money."

51. Homes England took into account the following public interest arguments in favour of maintaining the exemption:

- "Disclosing information which would impact on the ability of Homes England to value homes and calculate the amount of equity mortgage to be repaid."
- "Accountability for public money loaned for equity mortgages and the amount recovered and maximising the amount recovered."
- "External factors influencing the valuation of the property which would reduce the value of the property and the amount of equity mortgage recovered."
- "Loss of public confidence in Homes England that valuations and redemption figures are of market value."
- "Loss of public confidence in the ability of Homes England to recover the maximum amount of equity loan and recoup public money loaned."
- "Creation of losses to Homes England in not being able to recover the maximum amount of equity mortgage and recover public money loaned."
- "Negatively affecting the negotiating position of Homes England regarding the value of the home and the value of the equity mortgage."
- "Disclosure of factors taken into account by Homes England in negotiating valuations and redemption figures would negatively influence the outcome of the negotiations and would affect the amount of equity loan recovered."

52. Homes England provided the following information to the Commissioner regarding why it considers that on balance the public interest in maintaining the exemption outweighs that in disclosing the withheld information:

"The arguments for and against disclosure contain a commonality – public money. Whilst Homes England recognises the public interest in disclosing information on how it makes decisions about managing public money, it does not consider that the public interest in this case is so compelling that it can allow prejudice to its own commercial interest of managing that public money most effectively in order to maximise the value to the public of the Help to Buy: Equity Loan programme."

The Commissioner's analysis

53. The Commissioner considers the balance of the public interest to be finely balanced in this case. The public interest in transparency regarding the extent to which Homes England has been able to recover public money leant under the Help to Buy Equity Loan scheme is significant.
54. However, there is also a significant public interest in Homes England recovering as much of this money as possible. The Commissioner has already acknowledged that disclosure of the withheld information would be likely to prejudice Home England's ability to maximise the amount recovered.
55. Although the Commissioner considers the balance of the public interest to be finely balanced in this case, his decision is that, in this case, the public interest in managing public money most effectively outweighs that in providing transparency regarding how it had been managed.
56. For this reason, the Commissioner's decision is that the public interest in the exemption being maintained outweighs that in the information being disclosed on this occasion. Homes England was not, therefore, obliged to disclose the information in columns Y, Z, AA and AG (excluding headings).

Right of appeal

57. 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

58. 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.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Victoria James
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF