

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 December 2022

Public Authority: Department for Levelling Up, Housing & Communities

Address: Fry Buildings
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information about a Homes England pay review. The Department for Levelling Up, Housing and Communities (the DLUHC) withheld the information requested under section 35(1)(a) (formulation or development of government policy) of the FOIA. During the course of the Commissioner's investigation, the DLUHC disclosed some of the withheld information, but maintained that the remaining information was exempt under sections 35, 40(2) (personal information) and 41 (information provided in confidence). The Commissioner's decision is that the DLUHC correctly applied sections 35 and 41 to the withheld information. The Commissioner has also determined that with the exception of one redaction, the DLUHC has correctly applied section 40(2) to the request.
2. The Commissioner requires DLUHC to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under section 40(2) on page 6 of the Homes England new Pay Business Case.
3. DLUHC 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 FOIA and may be dealt with as a contempt of court.

Request and response

4. On 21 May 2021 the complainant wrote to the DLUHC and requested information in the following terms:

".... I would like to request the following documentation to assist with collective bargaining over pay:

The Business Case submitted to the Secretary of State in 2021 by Homes England

The Pay Remit Approval document that was then approved by the Secretary of State in 2021

Milestones and agreed timetables for evidencing progress against delivery agreed to by Homes England

'Business Case' - refers to the final document submitted to Permanent Secretary - Jeremy Pocklington - by the management of Homes and Communities Agency ('HCA' - trading as 'Homes England') in late February or early March 2021 seeking approval for proposals to combine the 2020/21 Pay Award to Homes England's staff with a 'Pay and Grading Review'

'Pay Remit Approval Document' - refers to the fact the Secretary of State rejected the final 'Business Case' from Homes England and approved instead a pay settlement of 2.5% for Homes England, I am therefore seeking this revised document subsequently approved by the SoS in early March 2021 in response to the 'Business Case'."

5. The DLUHC issued a refusal notice on 21 June 2021 and stated that the information requested was exempt under section 35(1)(a) of the FOIA.
6. On 21 July 2021 the complainant requested an internal review of the decision not to provide the information in question.
7. The DLUHC provided the outcome of its internal review on 29 November 2021 and upheld its decision that section 35(1)(a) applied to the information requested.

Scope of the case

8. The complainant contacted the Commissioner on 21 January 2022 to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation, as a result of the passage of time since the request was submitted, and the fact that pay

negotiations had concluded, the DLUHC disclosed the documents falling within the scope of the request, subject to some information being withheld under section 35(1)(a). The DLUHC also redacted other information under sections 40(2) and 42 (legal professional privilege).

10. Following this disclosure the complainant asked the Commissioner to consider the remaining information that the DLUHC had continued to withhold. The Commissioner asked the DLUHC for further representations in relation to the two new exemptions it had cited. The DLUHC then confirmed that it was withdrawing its reliance on section 42 and that section 41 was considered to apply instead.
11. In light of the above, the scope of the Commissioner's investigation is to consider whether the DLUHC correctly applied sections 35, 40(2) and 41 to the remaining withheld information to withhold the information at the time of the request.

Reasons for decision

Section 35 – formulation of government policy

12. Section 35(1)(a) FOIA provides an exemption from the duty to disclose information to the extent that it requires the disclosure of information relating to the formulation and development of government policy. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.
13. The purpose of subsection 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered policy options in private.
14. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.
15. The DLUHC confirmed that, at the time of the request and at the time of the internal review, the department and Homes England were engaged in staff negotiations relating to the pay award which the withheld information relates to. As such, it considers there to be a clear relationship between the withheld information and the policy in this area. The DLUHC confirmed that the relevant negotiations were live and ongoing at the time of the request.

16. The information which the DLUHC has withheld under section 35 is contained within a business case and supporting documents which were submitted by Homes England to the Secretary of State in order to seek approval for pay reform proposals.
17. The exemption covers information which 'relates to' the formulation or development of government policy. The Commissioner considers the term 'relates to' can be interpreted broadly. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
18. The complainant considers that, in its internal review, the DLUHC should have considered whether the original decision to withhold the information still applied at the time of the internal review. The complainant suggested that, at the time of the internal review, the business case had been signed off by the Secretary of State and as such the exemption at section 35 could no longer apply.
19. Following the comments of the Upper Tribunal in *Montague v Information Commissioner and Department for International Trade* [2022] UKUT 104 (AAC)¹, the public interest balance must be assessed on how matters stood at the time of a public authority's decision on the request. The *Montague* decision means that when a public authority conducts an internal review it cannot reassess the balance of competing public interests at this stage. Rather, it needs to look back at the decision to establish if – at the time of the request – it dealt appropriately with the request, including the balancing of the public interest. The decision also means that the Commissioner takes a similar approach when investigating complaints under section 50 of the FOIA, meaning he considers the position at the time of the request and not at the time of any internal review.
20. Having considered the withheld information and the DLUHC's representations, the Commissioner accepts that the information can be said to relate to the formulation and development of government policy, therefore section 35(1)(a) is engaged. He has therefore gone on to consider the public interest test.

¹ https://assets.publishing.service.gov.uk/media/6273a6ec8fa8f57a41d53ee9/UA_20_000324_000325_GIA.pdf

Public interest arguments in favour of disclosing the information

21. The DLUHC accepts that there is a general public interest in the "disclosure of internal government correspondence and information in order to promote transparency and accountability of public authorities".
22. The DLUHC also recognises that there is a public interest in disclosure of information relating to the use of public funds. In this case, disclosure would increase the public's understanding of decisions made around pay in Homes England.
23. The complainant is of the view that disclosure of the withheld information is necessary as they believe the withheld information contains reference to "fire and rehire" as an option and the DLUHC is withholding the information in order to avoid political embarrassment.

Public interest arguments in favour of maintaining the exemption

24. The DLUHC considers that it is in the public interest that government has a safe private thinking space in order to develop ideas, undertake discussions, and make decisions away from external interference, particularly concerning matters around pay awards and employee relations.
25. The DLUHC considers that disclosure would unacceptably erode the safe space required in order to develop policy in the area of pay awards and negotiations. It argues that disclosure would weaken the ability of officials to discuss sensitive issues such as pay matters.
26. The DLUHC pointed out that the safe space in this case was required as negotiations regarding pay were live and ongoing at the time the request was received.
27. The DLUHC explained that, following its review after the Commissioner commenced his investigation, it determined that most of the information it originally withheld could be disclosed as pay negotiations had concluded. However, in relation to the information it has continued to withhold it advised that "there are strands to the negotiations which carry over to future rounds of negotiation".

The balance of the public interest test

28. The Commissioner is always cognisant of the general public interest in openness and transparency of information generated by public authorities. He also accepts that there is a public interest in expenditure of public funds.
29. The Commissioner also recognises that negotiations around pay and grading will be of great importance to Homes England staff who will be

affected by any proposals. Therefore there would be a public interest in understanding the basis on which decisions regarding pay and grading are made and whether proposals are fair.

30. Having reviewed the withheld information, and in view of the DLUHC's explanations regarding the issue of pay and grading, the Commissioner is satisfied that the policy in this area was, at the time of the request, in a process of formulation and development. The Commissioner accepts that the exemption is designed to protect the policy making process and that, where disclosure might result in this process being impaired, it is arguable that this would not be in the public interest.
31. The Commissioner accepts that a safe space argument is relevant in this case, as the issues were live and ongoing at the time of the request and space away from public scrutiny is necessary to debate and finalise issues with a view to the formulation and development of this particular policy. The Commissioner also accepts that, as the subject matter was live at the time of the request disclosure would be likely to weaken the ability of officials to have free, frank and candid discussions about the matter.
32. Having considered all of the public interest arguments, both in favour of maintaining the exemption and of disclosure, the Commissioner considers that, in this case, the public interest is in favour of maintaining the exemption at section 35(1)(a) of the FOIA.

Section 40(2) – personal information

33. The DLUHC has withheld a small amount of information under section 40(2) of the FOIA from the documents it disclosed during the Commissioner's investigation. This is limited to the name and contact details of junior officers. In addition, the DLUHC also withheld the number of officials working at Homes England who equate to SCS Civil Service Grades in the Business Case document.
34. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
35. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

² As amended by Schedule 19 Paragraph 58(3) DPA.

processing of personal data (the DP principles), as set out in Article 5 of the UK General Data Protection Regulation (the UK GDPR).

36. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (the DPA). If it is not personal data then section 40 of the FOIA cannot apply.
37. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

38. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

39. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
40. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
41. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
42. In respect of the names and contact details of junior members of staff the Commissioner is satisfied that this information both relates to, and identifies the individuals concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
43. In respect of the number of SCS staff employed at Homes England referred to in the Business Case, the DLUHC has not provided any representations to explain how this constitutes personal data, including how any individuals could be identified through disclosure of this information. In addition, DLUHC’s representations in relation to its application of section 40(2) only refer to the personal data of junior members of staff.
44. The complainant has disputed this particular redaction and stated that details of the number of SCS staff employed by Homes England is publicly available in its annual accounts. In addition, the complainant stated that the business case confirms that all those above the new job level 20 are considered to be SCS civil service grade (paragraph 67) and

then in Table 6 of the document, the number of staff equating to each of the new proposed grades is explicitly set out. The complainant considers that this renders the redaction meaningless.

45. The DLUHC has not provided any representations in respect of why it considers that the number of Homes England SCS Staff is exempt under section 40(2), including how the information constitutes personal data. In view of this, the points made by the complainant, and the fact that the information relates to senior Homes England staff, the Commissioner has not considered the application of section 40(2) to this information any further and he has ordered disclosure of this information.
46. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
47. The most relevant DP principle in this case is principle (a)

Would disclosure contravene principle (a)?

48. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

49. 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.
50. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

51. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”³.

³ Article 6(1) goes on to state that:-

52. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
53. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

54. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

55. The DLUHC recognises that there is a legitimate interest in disclosure of the personal data in this case in respect of transparency. It also accepts that disclosure would better inform the public and assist them in engaging in matters to which the information relates.
56. The complainant accepts that it is reasonable for the names of non-public facing senior officials to be redacted. However, they consider that the names of "key interlocuters" should not be withheld. The complainant argues that withholding these names conceals the decision making process and the role played by key officials in this process.
57. The Commissioner accepts that there is a limited legitimate interest in disclosure of the names and contact details of the individuals in question.

Is disclosure necessary?

58. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
59. Although the Commissioner does not consider there is a particularly strong legitimate interest in disclosure of the names and contact details of junior members of staff, he accepts that the only way of knowing the role of the individuals is through disclosure of the withheld information. The Commissioner is unable to identify a less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

60. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
61. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and

- the reasonable expectations of the individual.
62. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
63. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
64. The DLUHC believes that any legitimate interests lie in the actual content of the documents in question as opposed to the names of junior officials. Although the DLUHC accepts that the information relates to the individuals' public lives, it considers that, as junior officials who are not in public facing roles they would have had a reasonable expectation that their names would not be disclosed into the public domain. The DLUHC considers that there is an insufficient legitimate interest in disclosure to outweigh the individuals' fundamental rights and freedoms.
65. Based on the above factors, the Commissioner has determined that the limited legitimate interest in disclosure is outweighed by the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

Section 41 – information provided in confidence

66. Section 41(1) of FOIA states that:
- “Information is exempt information if-
- (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person”.
67. The DLUHC explained that the information withheld under section 41 comprises confidential legal advice which Homes England obtained relating to collective bargaining over pay and, more specifically, to the salary negotiations which were ongoing at the time of the request. The information was provided to the DLUHC as part of a bundle to seek a decision from the Secretary of State on pay.

68. The Commissioner is satisfied that the withheld information is therefore information obtained from another person and this element of the exemption is met.
69. For section 41(1)(b) to be met disclosure of the withheld information must constitute an actionable breach of confidence. In the Commissioner's view a breach will generally be actionable if:
 1. The information has the necessary quality of confidence.
 2. The information was communicated in circumstances importing an obligation of confidence.
 3. Unauthorised disclosure would cause detriment to either the party which provided it or any other party.
70. The DLUHC considers that, as the withheld information relates to legal advice and concerned ongoing negotiations, it is reasonable for Homes England to have assumed that the information it provided to DLUHC was provided in confidence and that it would not be disclosed into the public domain. The DLUHC also confirmed that the is not accessible by any other means, and as such it has the necessary quality of confidence.
71. The DLUHC did not provide the Commissioner with detailed arguments in relation to the third criterion – detriment to the confider. However, it confirmed that it had consulted with Homes England who indicated that they objected to disclosure of the withheld information and that it would cause damage, harm or distress.
72. Based on the DLUHC's representations and having viewed the withheld information, the Commissioner is satisfied that the information has the necessary quality of confidence since it is not trivial and is not in the public domain. The Commissioner is also satisfied that the withheld information was provided in confidence to the DLUHC, for specific and limited purposes. Finally, the Commissioner is prepared to accept that detriment would be caused to the confider, if the withheld information were to be disclosed into the public domain.
73. Although section 41 is an absolute exemption (and there is no requirement to consider the public interest test), it is accepted that if there is an overriding public interest in disclosure it can be a defence to an action of breach of confidentiality.
74. The complainant argues that full disclosure of the information is required in order to better understand the 'holistic approach' referred to in the redacted documents that the DLUHC disclosed during the Commissioner's investigation. They pointed out that this approach was, at the time, never communicated to the relevant trade unions. The complainant also alleges that "'legally-privileged' material is being

obscured because it might otherwise lead be [sic] used against the Department in legal proceedings”.

75. The DLUHC accepts that there is a public interest in disclosure in terms of transparency and accountability. It also accepts that disclosure would increase public understanding, participation and enable individuals to understand, and possibly challenge decisions made which have had an effect on their lives.
76. However, the DLUHC considers that whilst the information may be of interest to the public, the negative impact that would result through disclosure would be damaging. As such it does not consider that it is in the public interest to disclose it. The information discusses legal opinion including options and solutions to the pay negotiations, which were ongoing at the time of the request, and disclosure would damage that process and make it harder to engage in discussions relating to future pay awards.
77. The Commissioner acknowledges that there is a public interest in disclosure of the withheld information as it would allow the public, and in particular, staff working in Homes England to assess the basis on which decisions about pay and grading arrangements have been made.
78. In reaching a decision in this case the Commissioner has taken into account the fact that the withheld information comprises legal advice which Homes England obtained on the pay review and that pay negotiations were ongoing at the time of the request.
79. Having considered all the circumstances of this case, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

Right of appeal

80. 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

81. 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.
82. 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

Joanne Edwards
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