

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

### **Decision notice**

**Date:** 14 March 2022

**Public Authority:** Homes England  
**Address:** Arpley House  
110 Birchwood Boulevard  
Birchwood  
Warrington  
WA3 7QH

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

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1. The complainant has requested information about a grant awarded to an affordable homes project. Homes England ('HE') disclosed information within scope of part [c] of the request and withheld information within scope of parts [a] and [b] under section 44(1)(a) of FOIA (prohibitions on disclosure). HE subsequently advised that the information requested at part [a] has now been published and is therefore exempt under section 21(1) (information accessible to applicant by other means). HE also withdrew its reliance on section 44 in respect of the information requested at [b] and now considers that this information is exempt from disclosure under section 43(2) of FOIA (commercial interests).
2. The Commissioner's decision is as follows:
  - HE is entitled to withhold information within scope of part [b] of the complainant's request under section 43(2) of FOIA and the public interest favours maintaining this exemption.
3. The Commissioner does not require HE to take any corrective steps.

## Request and response

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4. On 27 March 2021 the complainant wrote to HE and requested information in the following terms:

"Please see attached my response to the FOI section of Homes England confirmation that a Grant has been allocated to this affordable home project. With the build now nearly complete the local Parish Council and community require an understanding of all the issues involved, including ownership of the homes as the Service Provider and Landlord. Also the total Cost plan and percentage of Grant allocated to finance the project, leaving financing the balance compliant with the charity protocols.

The history of the ownership of the land and buildings of the Woolsey Sports and Community Hall and its registration as a charitable organisation is known but now somewhat confused by recent changes on Land Registration changes and charitable status, obviously made to accommodate the affordable homes project. Attempts to resolve these public concerns amicably with the Parish and District Councils resulting in a Formal Complaint in process to the Secretary of State.

Homes England are therefore requested to confirm **[a]** the grant allocated to this project, **[b]** its percentage of the total cost, **[c]** whether the grant has been paid and to whom."

5. HE responded on 13 April 2021. It provided the information relevant to part [c] of the request and refused to disclose the remainder of the information under section 44(1)(a) of the FOIA.
6. HE provided an internal review on 11 May 2021. It maintained its reliance on section 44(1)(a).
7. HE advised the Commissioner on 31 January 2022 that some of the information to which it had applied section 44(1)(a), namely part [a] of the request - confirmation of the grant allocated to the project - has now been published<sup>1</sup>. It had communicated this to the complainant in correspondence dated 18 February 2022. HE also advised that the

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1047366/Funding-by-lead-provider.csv/preview](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1047366/Funding-by-lead-provider.csv/preview)

published information is now exempt from disclosure under section 21(1) of FOIA as it is accessible to the complainant by other means.

8. In its 18 February 2022 correspondence, HE advised the complainant that it had withdrawn its reliance on section 44 in respect of part [b] of the request and considered that that information is exempt from disclosure under section 43(2) of FOIA.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 6 August 2021 to complain about the way their request for information had been handled.
10. The Commissioner's role is solely to consider whether or not HE has complied with FOIA in this case. He cannot consider the wider matters about land ownership that appear to concern the complainant.
11. Information within scope of part [a] of the request has now been published and is accessible to the complainant, and HE disclosed information within scope of part [c] in its response to the request. The Commissioner's investigation has therefore focussed on whether HE is entitled to withhold the information in part [b] of the request under section 43(2) of FOIA, and the balance of the public interest.

## **Reasons for decision**

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### **Section 43 – Commercial interests**

12. HE is relying on section 43(2) of FOIA in respect of part [b] of the request. In part [b], the complainant has requested the percentage that the amount of grant awarded to a particular body bears to the total cost of the project.
13. Section 43(2) of the FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Section 43(2) is subject to the public interest test. In cases where information is exempt from disclosure the information may still be disclosed if the public interest in releasing the information is greater than in maintaining the exemption.
14. For section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the applicable interests within the relevant exemption. Second, 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 that is alleged must be real, actual or of substance. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

15. In its submission to the Commissioner, HE has described the information requested in part [b] as comprising details of the parameters HE uses when it assesses bids received for the Shared Ownership and Affordable Housing Programme (SOAHP) 2016-2021.
16. HE has explained that all of its grant programmes operate on a bidding process which rely on grant applications being made for the minimum amount required by the bidders. The object of this process is to ensure that a grant is not awarded above the level required, thereby protecting public resources. Publishing these parameters would allow bidders to tailor their bids to achieve the highest level of grant available.
17. In considering whether to apply the exemption in section 43(2), HE says it has considered the fact that the bid in question is historic and therefore that the passage of time may have reduced the commercial sensitivity of the information. However, HE continues to provide grant funding by way of SOAHP. The policy for assessing bids has been developed over time and remains the same under current live programmes. In this case, therefore, the historic nature of the information withheld does not make it less likely to prejudice HE's commercial interests.
18. HE has confirmed that the threshold of likelihood it is relying on in this case is that disclosure is likely to prejudice HE's commercial interests if it is released. The release of information has to be treated as a release to the world and not only to the complainant. If the information was made available to all prospective bidders for HE's SOAHP, this would enable bidders to structure their bids in such a way as to ensure that they meet HE's assessment criteria. It may therefore lead to bids for more than the funding required for a particular scheme. This means that there is a real and significant risk that releasing the withheld information would be likely to have a prejudicial effect on HE's commercial interests.

### **The Commissioner's conclusion**

19. In relation to part [b] of the request, the Commissioner is satisfied that the harm HE envisions if the withheld information was disclosed relates to the interests relevant to section 43(2) because it relates to its own commercial interests.

20. Regarding the second of the criteria, the Commissioner is satisfied that a causal relationship exists between releasing the withheld information and prejudice to HE's commercial interests. This is because the process HE uses to assess bids is the same as the process it used to assess the bid that is of interest to the complainant. Disclosing the requested information would therefore give prospective bidders for HE's SOAHP grant funding an insight into the parameters it uses to assess bids. With this information, a potential bidder could tailor its bid in order to achieve the highest amount of grant available, and not simply the minimum it needs. Ultimately, this could lead to HE awarding more grant funding than it should or needs to, which would not be an efficient use of the public money it manages. The Commissioner is satisfied that such commercial prejudice is not trivial and would be of substance.
21. HE subsequently confirmed to the Commissioner that the total cost of the project is not published elsewhere. Despite the information requested in part A of the request having now been disclosed, it would therefore not be possible for a person to calculate the percentage grant allocated to the development ie it is not already possible to calculate the information requested in part B.
22. Regarding the third of the criteria, HE's position in its submission to the Commissioner is that the envisioned prejudice would be likely to happen. The Commissioner considers this is a credible concern and that the chance of prejudice occurring is more than a hypothetical possibility and that there is a real and significant risk.
23. Since the three criteria have been met, the Commissioner's decision is that the information the complainant has requested in part [b] of their request engages the exemption under section 43(2) of the FOIA. He has gone on to consider the associated public interest test.

### **Public interest test**

#### **Public interest in disclosing the information**

24. There is a general public interest in public authorities being transparent, but the complainant has not presented any specific public interest arguments for the information's disclosure in their request for an internal review, or their correspondence to the Commissioner.
25. HE has acknowledged that there is a legitimate public interest in understanding good decision-making by public bodies, in ensuring fair treatment of bidders, in ensuring fair competition and in securing the best use of public resources.
26. HE considers there is also a legitimate public interest in being fully informed about, and equipped with, the information required to challenge the decisions public bodies make. This leads to increased

accountability of public bodies and so protects the public purse.

### **Public interest in maintaining the exemption**

27. HE has noted that the Commissioner's published guidance recognises that public bodies need space and time in which to fully consider their policy options, to enable them to reach an impartial and appropriate decisions, away from public interference. HE says that it accepts that over time this argument weakens. But because HE still administers live grant programmes on the basis of the same assessment criteria, this is still a live issue and so its concerns remain very considerable.
28. HE has concluded, on balance, that it is not 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 policy for assessing current grant programmes has been formulated and developed from earlier programmes and the same assessment criteria are applied to those current programmes.
29. HE has also noted the Commissioner's decision in FER0760247<sup>2</sup>. It says that in that case the withheld information related to a live issue. That added considerable weight in favour of maintaining an exception which the Commissioner found to be engaged.

### **Balance of the public interest**

30. The decision that HE has referred to above discusses a number of exceptions provided in the Environmental Information Regulations (EIR), but none of the exceptions discussed in that notice relate to commercial interests.
31. The public interest arguments that a public authority puts forward for withholding information must relate to the relevant FOIA exemption (or EIR exception) that it has applied to the information. The issue of whether a matter is still 'live' and the issue of a 'safe space' for discussion and deliberation being necessary, which HE has also mentioned, are not obvious considerations in relation to section 43(2).
32. Concepts such as competition, reputational damage, the ability to generate income and negotiating position are some of public interest arguments that are more pertinent to the section 43 exemption, and there are others. In this case, HE has said that it considers there is a

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614887/fer0760247.pdf>

public interest in it not jeopardising 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 considers that that the efficient and fair use of public money is a valid argument.

33. The Commissioner appreciates that the information the complainant has requested is of interest to them, but they have not made a case that it has a significant wider public interest. Neither is it clear how knowing the percentage that the amount of grant awarded bears to the total cost of the project in question would assist the complainant with their wider concern about the ownership of particular land. As such, the Commissioner considers that the information HE provided to the complainant and the information that it has now published meets the general public interest in transparency and HE's financial affairs.
34. In the Commissioner's view there is greater public interest in HE being able to achieve the best value for money in the way it manages the SOAHP grant funding, which is public money, and in HE's bidding process for the funding being robust and fair. That can best be achieved by the requested information being withheld.

## **Right of appeal**

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35. 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)

36. 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.
37. 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**

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