

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 June 2022

Public Authority: Homes & Communities Agency (trading as Homes England)

Address: foi@homesengland.gov.uk

Decision (including any steps ordered)

1. The complainant requested a copy of the latest version of the business case on pay and grading reform and pay offer. Homes England withheld the information requested under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) (effective conduct of public affairs). The Commissioner's decision is that Homes England has correctly applied 36(2)(b)(i) and 36(2)(b)(ii) to the withheld information. The Commissioner does not require any steps to be taken.

Request and response

2. On 20 January 2022, the complainant wrote to Homes England and requested information in the following terms:

"We would like to request the following documentation/information:

The current version of the Business Case on Pay and Grading Reform and Pay Offer (2019-20) – which is understood to have been submitted to MHCLG".

3. Homes England issued a refusal notice on 18 February 2021 stating that the information requested was exempt under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOIA.
4. On 15 April 2021 the complainant requested an internal review of the decision not to disclose the information requested.

5. Homes England provided the outcome of its internal review on 14 May 2021 and upheld its decision that the information was exempt under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 15 May 2021 to complain about the way their request for information had been handled.
7. The scope of the Commissioner's investigation is to consider whether Homes England should disclose the information held relevant to the request or whether it was correct in relying on section 36 of the FOIA.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

8. Section 36 of the FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
9. In this case the Commissioner is considering the application of the exemptions at sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
10. Sections 36(2)(b)(i) and (ii) provide that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
11. In order to establish whether the exemptions have been applied correctly the Commissioner has:
 - Ascertained who is the qualified person or persons for the public authority in question;
 - Established that an opinion was given;
 - Ascertained when the opinion was given; and

- Considered whether the opinion given was reasonable.

Who is the Qualified Person and have they given an opinion?

12. Homes England provided the Commissioner with a copy of a submission that had been provided to Nick Walkley, its Chief Executive, outlining why it would be appropriate to rely on section 36 to withhold the requested information. The submission was signed by Nick Walkley on 16 February 2021.
13. At the time of the request Nick Walkley was the Chief Executive of Homes England and the Commissioner is satisfied that the Chief Executive is authorised as the qualified person under section 36(5) of the FOIA. The submission indicates that the withheld information was shown to the qualified person. The Commissioner notes that the qualified person signed their agreement to the submission which indicated that the level of prejudice claimed was the lower threshold of "would be likely".

What was the Qualified Person's opinion and is it reasonable?

14. The Commissioner has gone on to consider whether the qualified person's opinion is reasonable. It is not the role of the Commissioner to substitute his own opinion for that of the Qualified Person. The Qualified Person is best placed to know the circumstances of their organisation and the significance of the information concerned. It thus follows that the bar for finding that an opinion is "reasonable" is not a high one.
15. A "reasonable" opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd. The Commissioner considers that an opinion is likely to be unreasonable if it fails to make out the grounds for the exemption or if the information is already in the public domain.
16. In the opinion of the qualified person the exemptions at 36(2)(b)i), 36(2)(b)(ii) and 36(2)(c) are applicable to the withheld information because:

"The question concerns an important issue regarding Pay and Grading for the Agency and there needs to be free and frank exchange of views on the Business case and its impacts. Disclosure may inhibit provision of advice/ views and thereby impair the quality of decision making. It may inhibit the ability of officers and third parties (MHCLG officers as the sponsoring body) to express themselves openly, honestly and completely. Exchange of views is part of the evaluation of competing arguments. Loss of frankness would have a chilling effect and damage

the quality of views/advice which could lead to poorer decision making. Government needs a safe space in which to develop ideas and reach decisions including those about resource priorities. The information has been generated internally and is pertinent to considerations that Ministers may wish to explore. Disclosure may lead to speculation around information when Ministers and officials need an appropriate degree of private space within which to evaluate these considerations”.

17. Homes England explained that the business case “seeks approvals, makes recommendations and sets out possible options. It recommends a preferred option and sets out a rationale in support of that preferred option”. At the time of the request Homes England stated that the business case had not been approved by the Ministry of Housing, Communities & Local Government (MCHLG). As a result, it is the view of the qualified person that disclosure would cause an adverse effect on the ability of Homes England to implement the pay and grading consultation and carry out the relevant negotiations with staff and unions. Following approval, the business case would then be subject to consultation with the relevant union and any affected staff. In light of this Homes England considers that the matter to which the withheld information relates was very much live at the time of the request.
18. The complainant asserts that section 36 cannot apply to the information requested because the document requested was a ‘finished document’ when it was submitted for statutory approval and was not, therefore, part of a free and frank exchange of views for the provision of advice. In addition, the complainant alleged that, at the time of the internal review, the documents in question, or at least one of them, had been approved.
19. The Commissioner accepts that it is reasonable for the qualified person to consider that there was a need for a safe space to deliberate upon matters concerning the pay and grading review. The process which the qualified person is referring to as needing to be protected under section 36 is the process of being able to discuss and debate issues, such as the pay and grading reform, away from the public eye.
20. The Commissioner notes that at the time of the request, the business case on pay and grading had not received approval and that once it had been approved appropriate consultations would be undertaken with the relevant unions and staff involved. The Commissioner considers that it is a reasonable opinion to hold that disclosure would be likely to inhibit the free and frankness of exchanges and debate and weaken the advice and views being shared. The Commissioner does not believe it unreasonable to reach a view that disclosure of the withheld information whilst such negotiations and considerations were ongoing would be likely to inhibit the ability of the relevant parties to deliberate on the matter.

21. The Commissioner accepts that approval may have been granted at the time of the internal review, as alleged by the complainant. However, even if this was the case, the Commissioner notes that following approval of the business case further discussions and negotiations with the relevant trade unions and staff were required. As such, he considers that it is not unreasonable to think that disclosure would still affect the willingness of officials to express their views freely and frankly or provide advice in future negotiations.
22. Having reviewed the withheld information the Commissioner is satisfied that the reasons outlined by the qualified person fit substantially with the application of sections 36(2)(b)(i) and (ii). He is also satisfied that the qualified person's opinion - that inhibition relevant to those subsections would be likely to occur through disclosure of the withheld information - is reasonable. The Commissioner's conclusion is, therefore, that the exemptions provided by section 36(2)(b)(i) and (ii) are engaged.
23. The submission to the Qualified Person, as referred to in paragraph 16 above, does not identify which representations/arguments relate to which subsection of section 36(2) Homes England is claiming. The Commissioner has therefore used his judgement in order to identify which representations relate to each limb of 36(2) cited by Homes England. As far as the Commissioner can see, the only representations which possibly relate to 36(2)(c) is the argument that disclosure "may lead to speculation around information when Ministers and officials need an appropriate degree of private space within which to evaluate these considerations".
24. In order for section 36(2)(c) to also apply, the prejudice envisaged must be different to that covered by any other exemption. The fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). Having read the qualified person's opinion and the submissions received from Homes England the Commissioner does not consider the arguments presented are sufficiently different to those that would come under section 36(2)(b) to warrant the application of section 36(2)(c).
25. The arguments presented by Homes England primarily relate to the need for a safe space to evaluate options. The Commissioner considers these are more fitting to section 36(2)(b). For section 36(2)(c) to also apply Homes England would have to provide arguments which suggested that the prejudice is different - for example disclosure would interfere with or distract from the issue at hand in another way or would prejudice or undermine the decision itself. Further, Homes England has not explained how speculation around the subject matter to which the information relates to would be likely to otherwise prejudice the conduct of public affairs. It follows that the Commissioner is not satisfied that

the qualified person's opinion about the likelihood of prejudice under section 36(2)(c) is reasonable. Therefore he does not find section 36(2)(c) engaged.

Public interest test

26. Section 36 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. As the Commissioner has accepted that sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged he has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

27. Homes England accepts that there "is a legitimate public interest in promoting accountability, transparency, public understanding and involvement in how public bodies make decisions".
28. Homes England also acknowledges that disclosure would result in the public being better informed and more able to engage in the implementation of proposals which affect them.

Public interest arguments in favour of maintaining the exemptions

29. In terms of section 36(2)(b)(i) Homes England submitted the following representations in favour of maintaining the exemption:

"In order to discuss the full range of options and impacts on pay and grading, Homes England and its officers need to be able to provide free and frank advice to its sponsor department, Ministry of Housing and Local Government (MHCLG) (as at the time of the request) in order to aid decision making. Given the legitimate public interest in the public money earmarked for the pay and grade review to be applied as effectively as possible, Homes England's business case needs to be robustly presented which disclosure of the information would be likely to inhibit; the authors of the business case are entitled to provide confidential advice on sensitive or confidential matters without fear that the advice will be disclosed to the public – disclosure would impact an officer's willingness to engage in free and frank discussions about complex issues if those views were subsequently made public. As a consequence, this would impair the quality of internal and external decision making as disclosure would be likely to prejudice the ability of Homes England and its officers to express sensitive matters openly, honestly and completely. Loss of frankness would have a chilling effect and damage the quality of advice which could lead to poorer decision making".

30. In terms of section 36(2)(b)(ii) Homes England submitted the following representations in favour of maintaining the exemption:

"The business case seeks approvals, makes recommendations and sets out possible options. It recommends a preferred option and sets out a rationale in support of that preferred option. The business case therefore constituted the provision of advice and an exchange of views, since it conveyed Homes England's views, advice and recommendations to the Secretary of State on the question of Pay and Grade. Given the legitimate public interest in the public money earmarked for the pay and grade review to be applied as effectively as possible, Homes England's business case needs to be robustly presented. In order to do so, Homes England and its officers need to be able to exchange views on the full range of options and impacts and deliberate the resulting decisions in a free and frank manner to MHCLG in order to aid decision making. Disclosure of the information would be likely to inhibit this and therefore impair the quality of internal decision making and prejudice the ability of Homes England and MHCLG to express themselves openly, honestly and completely. Exchange of views is part of the evaluation of competing arguments. Loss of frankness would have a chilling effect and damage the quality of the exchange of views which could lead to poorer decision making".

31. Homes England considers that there is a public interest in it being able to deliver its statutory and strategic objectives. This requires robust pay and reward policies and principles to be in place. Homes England does not consider it to be in the public interest to jeopardise its ability to provide free and frank advice to, and exchange views with its sponsor department about matters such as pay and grading.
32. At the time of the request Homes England confirmed that the withheld information had not been approved. It considers that it is in the public interest that the "presentation, evaluation and costing of pay and grading options occurs in a safe space in order to ensure the highest quality discussions and decisions are made, where Homes England and MHCLG are able to express their views freely and fully, in confidence". Homes England referred to the ICO decision in IC-49636-X8P7¹ which involved withheld information relating to a live issue where the Commissioner accepted that this added weight to the arguments in favour of maintaining the exemption at section 36. Homes England acknowledged that the pay and grading review to which the withheld information relates has now been implemented for the majority of its

¹ [IC-49636-X8P7.pdf \(ico.org.uk\)](https://ico.org.uk/IC-49636-X8P7.pdf)

staff but there are still a small number of staff for which the exercise has not yet concluded.

Balance of the public interest

33. When considering complaints regarding the application of the exemptions at section 36(2)(b), where the Commissioner finds that the qualified person's opinion was reasonable he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur. However, he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test favours disclosure.
34. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis of how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities. Disclosure in this case would allow the public to scrutinise the basis of the decisions about the future pay and grading arrangements for Homes England staff.
35. 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 strong public interest in understanding the basis on which decisions regarding pay and grading are made and whether proposals are fair.
36. The Commissioner recognises that pay offers are often made following a series of negotiations. In this case Homes England had to seek approval from MHCLG as to the pay and grading proposal, following which negotiations would then need to take place with the recognised trade unions.
37. The Commissioner notes that the subject matter associated with the withheld information was live at the time of the request. The Commissioner accepts that disclosure of the withheld information in this case, would be likely to have a chilling effect on Homes England's ability to conduct further rounds of pay negotiations. This is because officials would be less likely to offer candid advice and exchange free and frank views on the issues. The Commissioner also recognises that as matters relating to pay and grading are sensitive, there is a real and significant danger of a chilling effect on the way that officials engage in future pay and grading proposals if they are written with an expectation that they would be published prior to any agreement being reached and negotiations concluded.

38. The Commissioner recognises that, inherent in the section 36(2)(b) exemptions is the argument that a public authority should be afforded private space for staff in which issues can be considered and debated, advice from colleagues and subject experts can be sought and freely given and ideas tested and explored to protect the integrity of the deliberation process. The Commissioner accepts that a safe space is required when issues under discussion are still live and in the development/proposal stage, as in this case. At the time of the request, the Commissioner considers that there was a real likelihood that disclosure would hinder Homes England's ability to consider its options fully and discourage those staff involved in the process from participating in a free and frank way.
39. Section 36 does not require the particular information to be noticeably free and frank in order for the exemption to apply. It is sufficient for a public authority to demonstrate that disclosure of information could inhibit deliberations which are either ongoing or are likely to take place in future. However, the Commissioner notes that the withheld information in this case does contain sections which offer robust assessments of various scenarios and risks relating to pay and conditions. This adds to the public interest in maintaining the exemption.
40. Taking all factors into consideration the Commissioner considers the public interest is best served by maintaining the exemption in this particular case. The Commissioner must consider the circumstances at the time of the request and accepts that, at that time, Homes England required a safe space to obtain and consider free and frank advice and deliberate openly, candidly and honestly on how to move forward.
41. The Commissioner therefore concludes that Homes England has correctly engaged the exemptions at section 36(2)(b) FOIA and that the balance of the public interest lies in maintaining the exemption for all of the withheld information. Homes England was not, therefore, obliged to disclose the requested information.

Right of appeal

42. 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

43. 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.
44. 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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