

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 December 2024

Public Authority: Regulator of Social Housing
Address: 7-8 Wellington Place
Leeds
LS1 4AP

Decision (including any steps ordered)

1. The complainant has requested communications between the Regulator of Social Housing (the RSH) and two Registered Providers (RP's) relating to a potential merger.
2. The RSH responded and disclosed some correspondence but withheld information under section 31 (law enforcement), 40 (personal information), 41 (information provided in confidence), 42 (legal professional privilege) and 43 (commercial interests) FOIA. The complainant also queried if further information was held.
3. The Commissioner's decision is that the RSH has conducted appropriate searches and that all relevant information has been located in line with its obligations under section 1. He also finds that the majority of the information engages section 41 and the RSH has correctly withheld this. Personal data has also correctly been withheld under section 40 FOIA. For the remaining information withheld under section 43 and section 31 the Commissioner does not find either exemption is engaged. This information is contained in documents referred to as Annex 9 and Annex 13 by the RSH.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information in Annex 9 and Annex 13 withheld under either section 31 or 43 exclusively.

5. The public authority 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

6. On 28 November 2023 the complainant made the following request for information to the RSH:

“On 26 June, it was announced that Tower Hamlets Community Housing (THCH) and Poplar Housing and Regeneration Community Association (Poplar HARCA) are planning a potential merger. With that in mind, I politely request the following information under the Freedom of Information Act 2000:

- 1) Emailed and private communication between employees of the Regulator of Social Housing and employees of THCH which concern the potential merger, between 1 January 2023 and 1 April 2023. Simple screenshots of the communication would suffice, provided the date of each item of communication is included.
 - 2) Emailed and private communication between employees of the Regulator of Social Housing and employees of Poplar HARCA which concern the potential merger between 1 January 2023 and 1 April 2023. Simple screenshots of the communication would suffice, provided the date of each item of communication is included.”
7. The RSH responded on 29 January 2024 disclosing correspondence between itself and THCH and explaining that attachments to the correspondence such as board minutes, packs, other minutes and some of the information in the main body of the emails had been withheld under sections 31(1)(g) and (2)(c), 40(2), 41, 42 and 43(2) FOIA. For part 2) of the request the RSH stated the information was not held.
 8. The complainant requested an internal review on 18 March 2024, asking the RSH to focus on explaining why no private communications were included and questioning the response that no communications between the RSH and Poplar HARCA employees existed. The complainant also questioned the use of the various exemptions cited to withhold information.
 9. The RSH responded on 17 April 2024 with the outcome of its review, upholding its use of the exemptions and reiterating no further information was held beyond that already identified.

Scope of the case

10. The complainant contacted the Commissioner on 12 June 2024 to complain about the response from the public authority.
11. During the course of the Commissioner's investigation the RSH conducted additional searches which resulted in the identification of a small number of emails in scope of part 2) of the request. These emails were provided but the attachments withheld under the exemptions previously cited.
12. The Commissioner considers the scope of his investigation is to determine if the RSH has identified all information in scope of the request and if it has correctly relied on the cited exemptions to withhold information.

Background

13. In March 2023 the RSH published a regulatory judgement for Tower Hamlets Community Housing (THCH), finding it was non-compliant with the Governance and Financial Viability Standard¹.
14. The information in scope of the request relates to the RSH's engagement with a registered provider (RP) of social housing with regard to a potential merger. This merger between THCH (the RP) and Poplar HARCA had been expected to complete in Spring 2024 but it was announced in April 2024² that this merger would no longer be happening.
15. At the time of the request regulatory oversight work with THCH was ongoing and remained an open case with the RSH's engagement team and THCH was exploring potential partnerships with other parties. An announcement of a possible partnership was made in August 2024³.

¹ [RSH publishes regulatory judgement for Tower Hamlets Community Housing following a breach of the economic standards - GOV.UK](#)

² [Poplar HARCA and Tower Hamlets Community Housing ditch merger talks | News | Housing Today](#)

³ [Exploring a partnership opportunity with Tower Hamlets Community Housing | The Hyde Group](#)

Reasons for decision

Section 1 – information held

16. Section 1 (1) FOIA states that: “Any person making a request for information to a public authority is entitled – (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.”
17. Section 1(1) requires that a public authority must inform a requestor, in writing, whether it holds information falling within the scope of the request. If the public authority does hold relevant information, FOIA also requires that it communicates that information to the requestor, subject to any exclusions or exemptions applying.
18. In scenarios where there is some dispute between the amount of information held which a public authority says it holds, and the amount of information that a complainant believes is held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
19. In other words, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any - or additional - information which falls within the scope of the request (or held any at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information is held.
20. The complainant challenged whether all information had been identified by the RSH, particularly whether any private communications in scope of the request might be held.
21. The RSH advised it treated the term ‘communication’ widely when conducting searches, looking at not just correspondence between the RSH and the parties named but also notes of conversations, Microsoft Teams chats, emails and attachments. It began by contacting relevant members of staff across departments with engagement with the parties. This included the RSH’s Investigation and Enforcement team, Consumer Regulation and Regulatory Operations teams and members of the RSH’s Executive team. Staff provided links to any relevant casefiles held centrally on the RSH’s systems and these files were then scrutinised and any in scope information extracted.
22. On receipt of the internal review request the RSH sent additional clarification to staff on what was meant by “private communication” and that it included any non-official routes that may have been used to

correspond with the RP or other party and this would extend to text messages and WhatsApp. Further searches by staff found no additional information.

23. The RSH has stressed that its policies and procedures do not allow staff to use personal email addresses when working on official tasks and it would be against its acceptable use of ICT policy to do so. Staff are also clear that this extends to other methods of personal communication for official purposes.
24. The Commissioner has been provided with documents by the RSH that set out the information located during these searches and considers these to be a thorough and comprehensive record of the information held. The searches carried out by the RSH would be sufficient to identify information held that is relevant to the request and he is satisfied with the explanations provided by the RSH relating to the non-existence of private communications. The Commissioner has no compelling reason to consider the assurances given by the RSH are not an accurate representation of the searches and information found.
25. Based on this the Commissioner is satisfied that, on the balance of probabilities, the RSH has identified all information within the scope of the request and no further information is held.

Section 41 – information provided in confidence

26. The RSH has withheld information under a number of exemptions. It considers the majority of the information engages section 31 (law enforcement), sections 41 (information provided in confidence) or section 43 (commercial interests) as an alternative. There are also a smaller number of documents where information has been withheld solely under section 31 or section 43. Some information identified as engaging section 42 (legal professional privilege) is contained within a document that has been withheld in full under section 41, 43 or 31 so section 42 will only need to be considered if the other exemptions do not apply.
27. The Commissioner has first considered the application of section 41.
28. Section 41 allows a public authority to withhold information that has been provided to it by another person and whose publication would be an actionable breach of confidence.
29. To establish the basis for a breach of confidence, the public authority must demonstrate that the information has the necessary quality of confidence; that it was imparted in circumstances implying a duty of confidence; and that publication would cause detriment to the confider.

Was the information obtained from another person?

30. The RSH argues all the information identified as confidential was provided by THCH and some of this included information shared with THCH or created by external parties such as Poplar HARCA or a consultant.
31. The Commissioner has reviewed all the withheld information identified by the RSH. The information has all been provided to the RSH by THCH so can be said to have been provided by another person. The information can be broadly categorised as minutes of joint board meetings between THCH and Poplar HARCA, documents created for THCH by the consultant, and discussion papers including business cases produced by the consultant.
32. The RSH did disclose the title of emails in scope of the request and in doing so looked at any attachment for information in these documents in scope of the request. The RSH provided the relevant extracts from the attachments to the Commissioner in a document (referred to by the RSH as Annex 9) and identified some of this information was also information obtained by another person as the information had been provided by THCH or the consultant. The Commissioner has reviewed the extracts where section 41 has been cited and accepts they do contain information obtained by another person.

Would disclosure constitute an actionable breach of confidence?

33. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner must consider the following:
 - whether the information has the necessary quality of confidence
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Necessary quality of confidence.

34. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
35. The Commissioner accepts that none of the information that has been provided by another person is trivial as it relates to the potential merger between THCH and Poplar HARCA and the RSH's ongoing monitoring of

THCH's Improvement Plan. The information was provided in confidence by THCH to assist with the implementation of THCH's Improvement Plan.

36. On the basis of these representations the Commissioner accepts that the withheld information is more than trivial to the confider (THCH). The information is also not otherwise available and, as such the Commissioner accepts it has the necessary quality of confidence.

Circumstances importing an obligation of confidence

37. This limb is concerned with the circumstances in which the confider of information passed the information on. The confider may have attached specific conditions to any subsequent use or disclosure of the information (for example in the form of a contractual term or the wording of a letter). Alternatively, the confider may not have set any explicit conditions but the restrictions on use are obvious or implicit from the circumstances.
38. The RSH argues that the RP provided information in circumstances importing an obligation of confidence and this was implicit based on the ongoing nature of the negotiations and the continuing regulatory work in the form of the improvement plan. The information was provided with no expectation of wider disclosure at a sensitive time and the open and candid nature of the disclosures reflects this.
39. Documents provided by the consultant to the RP were explicitly provided in confidence so it follows that their onward disclosure by the RP to the RSH was done with the intention that the documents and their contents remained confidential and were intended for a limited audience for a specific purpose.
40. The Commissioner accepts these arguments. The information has a clear obligation of confidence attached to it. The RP shared information with the RSH for a specific reason and was open in its disclosures, providing documents in full to allow the RSH oversight without feeling it necessary to hold anything back, this demonstrates the obligation of confidence attached to the information.

Detriment to the confider

41. The information covers a range of issues and includes financial information, discussions of strengths and weaknesses, the improvement plan, staffing and costings. The confider (THCH) considers disclosure would be detrimental as it would provide insight into the improvement plan. Some of the information documents discussions about the planned merger and provides details not publicly known at the time of the request.

42. The information produced by the consultants reveals details of their processes and methodology for overseeing mergers and they would be negatively affected by disclosure of information that might be of use to other companies without having to pay. These documents were presented to THCH with no intention they would be passed on and were explicitly stated as confidential. THCH providing this information to the RSH would likely be detrimental to THCH as it would undermine their relationship with the consultant (and potentially the merger) as the commissioning of this consultant to assist with the merger was not known at the time of the request. This is because the activity of seeking a partner affects market confidence and the willingness of lenders to financially support the social housing sector.
43. On the basis of these representations the Commissioner is satisfied with the RSH's position that disclosure would result in detriment to the confider of the information. Although section 41 is an absolute exemption, it is accepted that if there is an overriding public interest in disclosure, this can be used as a defence against any breach of confidentiality that might be brought against a public authority disclosing information under FOIA. In other words, the Commissioner must balance the public interest in the information with the inherent public interest in preserving the principle of confidentiality.
44. There is a recognised public interest in transparency and in providing stakeholders with information about the management and administration of RP's. The Commissioner also acknowledges there will be public interest in information relating to merger discussions as this may affect users of community and social housing.
45. However, there is a strong public interest in preserving the principle of confidentiality. The Commissioner acknowledges that breaches of trust may impact on the free flow of information and that if information is provided in confidence for a specific purpose and then disclosed more widely this will erode the trust between the RP and the RSH, affecting the effectiveness and efficiency of communications and the trust RP's have in the RSH.
46. The Commissioner has considered the circumstances of the case and the nature of the information that has been withheld under section 41(1) of FOIA. He has concluded that there is no overriding public interest sufficient to outweigh confidentiality in this instance. Therefore the Commissioner finds that the condition under section 41(1)(b) is met, and that the RSH was correct to withhold the information under section 41(1) of FOIA.
47. As the Commissioner has found that section 41 of FOIA applies he has not gone on to consider the application of section 31 and 43 (and in one

case section 42) to the same information. There remains a small amount of information that have been withheld under section 31 and section 43. The Commissioner has gone on to consider these exemptions.

Section 31 – law enforcement

48. Section 31 of FOIA allows a public authority to withhold information where its disclosure may make it more difficult for a regulator to carry out its work.
49. Specifically, section 31(1)(g) of FOIA states that information is exempt if its disclosure under FOIA would or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2).
50. The purposes in subsection (2) include at c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
51. RSH has stated it has functions set out in the Housing and Regeneration Act 2008 relating to economic regulation and regulating financial viability. It can take action if standards are breached and there is a risk of harm to tenants or potential tenants.
52. The information withheld under this exemption relates to RSH's engagement with RP's of social housing, THCH and Poplar HARCA relating to a potential merger. At the time of the request the merger discussions were ongoing and the merger was being considered by THCH in response to the regulatory judgement finding non-compliance with financial standards.
53. RSH argued that disclosing the information it identified as engaging this exemption, which relates to live regulatory activity, would distract from the completion of the engagement, the potential merger and would affect the willingness of RP's to be fully open with RSH and respond to queries with full and detailed information.
54. RSH advised that although it has a suite of regulatory powers it can use where RP's are failing to meet its standards, it operates a co-regulatory approach (consistent with its statutory duties), and therefore most of its regulatory work is done in cooperation with RP's, who supply key business information voluntarily. RSH considers disclosing this information would discourage RP's and other sector organisations from cooperating and supplying information on a voluntary basis.
55. This voluntary supply of information is important to identify problems and resolve them quickly and effectively. If there is a decrease in the likelihood of RP's cooperating openly there is a risk that RSH standards

will not be met and RSH will not be in as strong a position to ensure effective plans are in place at the earliest possible stage.

56. At the time of the request the regulatory activity was ongoing and the merger between THCH and Poplar HARCA was not completed. THCH are continuing negotiations with a potential merger partner and the information is still sensitive as it is still relevant. RSH argues that it, and the RP's, need to be able to focus on the activity of moving back into compliance, and finding a secure business model to protect their tenants.
57. The Commissioner notes that THCH had already been found to be non-compliant. As such he has considered whether disclosing the information in this case can truly be said to have the effect on the function of ascertaining whether circumstances justifying regulatory action may arise. RSH's arguments are related to the principle of voluntary cooperation and the process by which it obtains information.
58. The Commissioner accepts that the voluntary supply of information is an important part of the regulatory process. His guidance on section 31⁴ is clear that voluntary cooperation is an important part of regulation. However this is based on the idea that a voluntary flow of information can stop problems escalating and this is more effective than applying sanctions once things have gone wrong. In this particular case the RP had already been found to be non-compliant. The information supplied by the RP relates to the potential merger, intended to bring the RP back into compliance.
59. The Commissioner acknowledges the RP and the RSH were still in communication and the RSH still had oversight of the RP given their non-compliance. He does not consider this information was being exchanged for the purpose of the RSH determining if there were circumstances justifying regulatory action in existence, but instead to assist the RP in getting back to a point of compliance following the judgement of non-compliance.
60. The Commissioner notes that the RSH is concerned that disclosure may impact the willingness of other RP's to engage voluntarily with RSH in future investigations. The Commissioner can understand this concern and appreciates the importance of voluntary flows of information and preserving this process. However, this doesn't mean that any

⁴ [Sections 31\(1\)\(g\) – regulatory powers | ICO](#)

information provided to it in a voluntary manner must always be exempt from disclosure.

61. The Commissioner acknowledges the RSH's argument seems to be that disclosing information voluntarily supplied in this case relating to the potential merger will affect the voluntary supply of information by any RP in other circumstances but he isn't convinced the link between the two has been made. The Commissioner, and First-Tier Tribunal, have been clear that any organisation subject to regulation will want to engage openly with their regulator to avoid action being taken against them. Voluntary engagement at this point is in the interests of both parties and the Commissioner accepts that it is more efficient and effective to engage this way rather than resorting to using formal information gathering powers that slow processes down.
62. He considers this is a different situation and RP's should not, and would not, be put off engaging with the RSH to prevent situations arising where regulatory action may be needed by disclosing the information in this case that relates to a planned merger and progress against an improvement plan.
63. As such the Commissioner can't conclude that the exemption is engaged as the information is not being obtained for the purposes set out in section 31(2)(c) and he doesn't consider that RSH has sufficiently argued how disclosing this information would impact on future investigations and the ability to identify circumstances for regulatory action. The Commissioner therefore requires RSH to disclose the information that it identified as being solely exempt under section 31(1)(g) and 31(2)(c). For the RSH's reference this is the information in Annex 13 and the parts highlighted in blue in Annex 9.
64. The Commissioner must now go on to consider the application of section 43 by the RSH where this has been cited to withhold information in Annex 9 as an alternative to section 31.

Section 43 – commercial interests

65. Section 43(2) of FOIA states 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)."

66. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure "would be likely" to prejudice those interests.

67. In order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes 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 should 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, ie disclosure 'would be likely' to result in prejudice or disclosure or 'would' result in prejudice.

68. The term 'commercial interests' is not defined in FOIA. However, the Commissioner has considered his guidance on the application of section 43, 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."

69. The RSH has argued the commercial interests of both RP's (THCH and Poplar HARCA), a consultancy firm and some suppliers with commercial contractual arrangements would be likely to be prejudiced by the disclosure of the information.

70. The first consideration is whether the information is commercial information. The Commissioner has reviewed all of the extracts and notes they all relate to the RP's financial situation and how it can operate effectively and competitively.

71. The Commissioner is satisfied the information in question is therefore commercial information.

72. In terms of harm and the link between disclosure of the information and the commercial prejudice argued, the RSH stated the financial situation of the RP was very sensitive at the time of the request due to the merger negotiations. The RSH argue the sensitivity has not diminished as the RP is now engaged in negotiations with a new partner.

73. The arguments presented by the RSH, following consultation with THCH and the consultant related to concerns about the disclosure of financial

information, details about staffing, detailed project plans and strengths and weaknesses. This information, including detailed spreadsheets, was provided to the RSH by THCH and the Commissioner has already accepted this can be withheld under section 41 FOIA.

74. The remaining information withheld under section 43 is in the extracts in the document referred to as Annex 9. This information amounts to a series of statements and sentences about THCH's corporate strategy, some comments from RSH on the merger partner's suitability, discussions about Board appointments and structure and a broad reference to an overall forecasted deficit figure.
75. The Commissioner does not consider that there is a clear causal link between disclosure of this information and a genuine risk of prejudice to THCH's (or the consultant's) commercial interests through disclosure of this limited information. Whilst it may be that this information is commercial in nature as it all broadly relates to the merger or to THCH's situation and plans it is not clear that disclosing this limited information would have the impact that has been argued. The arguments are concerned with the more specific and detailed information that it has already been accepted can be withheld.
76. The Commissioner's view is that the section 43(2) exemption has not been shown to be engaged in relation to this information that has been identified in Annex 9 as engaging section 43 (or section 31). The RSH should now disclose this.

Section 40(2) – third party personal information

77. The RSH has continued to use section 40(2) to withhold personal data. Much of this is contained in documents the Commissioner has already determined has been correctly withheld under section 41. However, the RSH has continued to withhold personal data from Annex 9 and from some of the information it has already disclosed.
78. This personal information amounts to names and contact information of staff at the RSH, THCH, Poplar HARCA and the consultancy firm. The RSH states these are all less senior staff or are third parties with no expectation their names would be made public.
79. Section 40(2) says that information is exempt information if it is the personal data of another individual and disclosure would contravene one of the data protection principles. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
80. The Commissioner is satisfied that the redacted information is the personal data of the individuals involved.

81. In the case of a 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.
82. When considering whether the disclosure of personal information would be lawful, the Commissioner must deliberate 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.
83. The Commissioner considers that there is a legitimate interest - transparency around communications that the RSH has had and who was involved - and that disclosure of the requested information is necessary to meet that legitimate interest.
84. However, the Commissioner also recognises that the request seeks the identities and contact details of junior staff within the RSH, and also third party staff – who have engaged, or otherwise been copied into, correspondence with the RSH.
85. The Commissioner notes that there is significant caselaw relating to such information, which has consistently found that the rights and freedoms of those individuals must be protected save only in occasional situations where the legitimate interest is significant and overriding. This caselaw is reflected in the Commissioner's guidance on section 40(2)⁵, and the decision notices that the Commissioner regularly issues in such cases, example links provided⁶⁷.
86. In the circumstances of this case, the Commissioner does not consider that any significant and overriding basis has been evidenced for the disclosure of these individuals' personal data. Whilst these individuals have been involved in communications on behalf of the RSH, or other public authorities, this does not provide a default justification for their identities to become a matter of public record.
87. The Commissioner has therefore determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the individuals. Therefore, he considers that there is no legal basis for the RSH to disclose information of junior staff or third parties and to do so would be in breach of principle (a).

⁵ [Requests for personal data about public authority employees](#)

⁶ [ic-174200-p5q0.pdf](#)

⁷ [ic-208893-y8n2.pdf](#)

88. The Commissioner's decision is that the RSH is entitled to rely on section 40(2) of FOIA to refuse to provide this information.

Right of appeal

89. 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

90. 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.
91. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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