

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 March 2023

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

Address: Windsor House
45-50 Victoria Street
Westminster
London
SW1H 0TL

Decision (including any steps ordered)

1. The complainant requested from the Homes & Communities Agency (trading as Homes England) ("HE") a 'job evaluation score'. HE withheld the requested information under section 43(2) of FOIA.
2. The Commissioner's decision is that HE was not entitled to withhold the requested information under section 43(2).
3. The Commissioner requires HE to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
4. The public authority 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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 May 2022, the complainant wrote to HE and requested information in the following terms:

“Recently, the public servant position of Executive Director of Market, Partners and Places (ED MPP) was advertised on Civil Service Jobs (see attached job description and Candidates Pack).

Please could you advise the following:

- 1. Do you hold a record of a JESP assessment for the ED MPP? If so, then please could you provide me with the total JESP score and a score breakdown by JESP factors.**
 - 2. If there is no JESP score, then do you hold a record as to why Homes England has not undertaken a JESP evaluation? If so, then what is the reason?**
 - 3. If a JESP assessment was not done for the position of ED MPP, then has this job role been subject to any job evaluation to establish job weight? If it has been job evaluated, then please advise which job evaluation scheme was used and what was the job evaluation score.**
 - 4. Do you hold a record of ED MPP total remuneration package receiving CST clearance? If so, then when? If not, why not?”**
6. HE responded on 3 August 2022. It disclosed some information, and withheld the **“job evaluation score”** sought by part 3) of the request under section 43(2).
7. Following an internal review, HE wrote to the complainant on 12 September 2022. It maintained the application of section 43(2).

Reasons for decision

Section 43(2) – Commercial interests

8. Section 43(2) 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).”

9. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered his guidance on the application of section 43¹, 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."

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

10. The information withheld in this case is information relating to the scoring of a post. The Commissioner understands that such a score has implications for the grading and remuneration of the post.
11. The Commissioner has previously found, in decision notice FS50869478², that such information, relating as it does to a public authority's ability to attract suitable staff to deliver its business objectives, relates to a commercial interest.

The likelihood of the prejudice occurring

12. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties.
13. The Commissioner has been guided on the interpretation of the phrase "**would, or would be likely to**" by a number of First-tier Tribunal (Information Rights) ("the Tribunal") decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice-based exemption can be engaged; i.e., either prejudice 'would' occur, or prejudice 'would be likely to' occur.
14. With regard to 'would be likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that "**the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk**" (Tribunal at paragraph 15).

¹ <https://ico.org.uk/for-organisations/foi-guidance/section-43-commercial-interests/>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617326/fs50869478.pdf>

15. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that **"clearly this second limb of the test places a stronger evidential burden on the public authority to discharge"** (Tribunal at paragraph 36).

HE's position

16. HE has argued to the Commissioner that disclosure of the information would be likely to prejudice its commercial interests. This is because the disclosure of the information **"could lead to a negative effect on future recruitment activity and may result in a fewer number of applications which would have a negative effect on Homes England's ability to deliver its future commercial activity and compete with other organisations both in the public and private sector."**

17. HE has elaborated that it considers disclosure could:

- Erode confidence in the pay and grading scheme both for current and future employees;
- Lead to dissatisfaction and resignation amongst employees whose jobs have scored differently to another which is within the same grade;
- Be harmful if used to compare same or similarly titled roles to that in another organisation and or sector as direct comparison would be likely to give a skewed and misleading result.

18. HE has further argued that it is atypical of the majority of public authorities **"in that its employees are not directly comparable to civil servants. Rather, Homes England has a specialist role in delivering investment and development and draws its officers from typically private sector areas and is therefore competing with commercial entities when it recruits to its roles."**

The Commissioner's conclusion

19. The Commissioner has considered HE's arguments on the application of section 43(2), and specifically the claimed prejudice.
20. Having done so, the Commissioner is not convinced that disclosure of the information would cause the claimed prejudice. Whilst it is appreciated that HE may recruit more widely than other public authorities, and seek to recruit individuals from the private sector, the Commissioner does not consider that HE has sufficiently evidenced that

there would be a causal affect between disclosure and HE's ability to recruit and fulfil its purpose any more than other public authorities.

21. The Commissioner perceives that civil service recruitment is already subject to significant and expected transparency with regards to the grading of roles, and of remuneration.
22. In the aforementioned decision notice FS50869478, in which the Commissioner considered arguments that the disclosure of salary and bonus payments would allow staff to be 'poached', the Commissioner was likewise not satisfied that disclosure of the information would be likely to cause the claimed prejudice.
23. The Commissioner is also aware of several previous decision notices in which he considered the application of section 43(2) to seemingly similar information as that withheld in this case. This includes, decision notice FS50519880³, in which a public authority sought to rely upon section 43(2) to protect its financial interests, and decision notice FS50543323⁴, in which a public authority sought to rely upon section 43(2) on the basis that disclosure would prejudice the commercial interests of the creator of the relevant job evaluation scoring system. Whilst those two decisions have different contexts to the one here (and the Commissioner ordered disclosure based on those contexts), it is noted that neither raised any compelling argument that disclosure would cause prejudice to the commercial interests of the public authority itself.
24. Having considered the above, the Commissioner has concluded that HE has not demonstrated the exemption is engaged. As the exemption is not engaged, the Commissioner does not need to proceed further and consider the public interest test.

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/948890/fs_50519880.pdf

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043551/fs_50543323.pdf

Right of appeal

25. 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

26. 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.
27. 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

Daniel Perry
Senior Case Officer
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Wycliffe House
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