

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

### **Decision notice**

**Date:** 7 February 2024

**Public Authority:** Department for Levelling Up, Housing and Communities

**Address:** 2 Marsham Street  
London  
SW1P 4DF

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

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1. The complainant requested various information regarding the Business Case from Homes England on a Planned Exit Scheme in relation to the ending of its Help to Buy scheme. The Department for Levelling Up, Housing and Communities ('the DLUHC') refused the request citing section 35(1)(a) (the formulation and development of government policy) and section 43(2) (commercial interests). During the course of the Commissioner's investigation, the DLUHC also applied section 40(2) (personal information) to a small part of the information.
2. The Commissioner's decision is that the DLUHC was not entitled to rely on either section 35(1)(a) or section 43(2) FOIA. It was however entitled to rely on section 40(2) in respect of a small amount of personal information within the business case and the bulk of the supporting information.
3. The Commissioner requires the DLUHC to take the following steps to ensure compliance with the legislation.
  - provide a copy of the business case with redactions for the small amount of third party personal data.

- provide the supporting information which is was created by DLUHC on 23 March 2023.
4. The 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 the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 12 April 2023, the complainant wrote to the DLUHC and requested the following information:
- “...a copy of the **Business Case from Homes England on a 'Planned Exit Scheme'** (as referred to by the Parliamentary Under-Secretary of State on 31 March 2023).
- Any supporting documentation associated with this Business Case.”
6. The DLUHC responded on 12 May 2023. It confirmed that it holds relevant information, but refused the request on the basis of section 35(1)(a), section 41 (information provided in confidence), and section 43(2) of FOIA.
7. Following an internal review the DLUHC wrote to the complainant on 3 July 2023. It upheld its original decision to refuse the request on the basis of section 35(1)(a) FOIA.

## Scope of the case

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8. The complainant contacted the Commissioner on 5 August 2023 to complain about the way their request for information had been handled.
9. The complainant has stated that they requested the original business case, not the revised one subsequently re-submitted, and considers that the original business case is therefore by definition not a live policy issue.
10. The Commissioner notes that the complainant asked for a copy of the business case as referred to by the Parliamentary Under-Secretary of State on 31 March 2023. DLUHC will be aware which version was referred to by the Parliamentary Under-Secretary on 31 March 2023, and the Commissioner notes that the revised business case is dated 14 March 2023. Taking an objective reading of the request, the

Commissioner is satisfied that it is the revised business case, as opposed to the original one that falls within the scope of the request.

11. As stated in paragraph 1 of this notice, during the course of the Commissioner's investigation, the DLUHC has applied section 40(2) to a small amount of information in respect of junior civil servants who were copied into the business case and supporting information. The DLUHC also confirmed that it was no longer relying on section 41 FOIA for the information.
12. The scope of the Commissioner investigation is to consider the DLUHC's application of section 35(1)(a), section 43(2) and section 40(2) FOIA.

## **Reasons for decision**

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### **Section 35(1)(a) – formulation or development of government policy**

13. Section 35(1)(a) of FOIA states that:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy"

14. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
15. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
16. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
17. 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 Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
  - the final decision will be made either by the Cabinet or the relevant minister;

- the Government intends to achieve a particular outcome or change in the real world; and
- the consequences of the decision will be wide-ranging.

#### DLUHC's position

19. The DLUHC argued that the withheld information relates to the development of live government policy concerning the proposed exit scheme of Homes England. The DLUHC stated that the business case had been revised and re-submitted to officials and was therefore still relating to a live policy issue which was currently being reviewed at the time of the request.
20. The DLUHC informed the Commissioner that at the time of the request and internal review, the Department and Homes England were engaged in staff negotiations relating to a proposed redundancy programme to manage the closure of the Help to Buy scheme and the potential exit of affected staff. It added that as the information relates to these negotiations, it considers that there is a clear relationship between the withheld information and the development of policy in this area.

#### The Commissioner's position

21. The Commissioner notes that the Help to Buy scheme was a government policy aimed at helping first time buyers onto the property ladder by making new build homes more affordable. It also formed part of the government's wider housing policy. The information regarding the Help to Buy scheme online indicates that it had long been the intention to close the scheme in March 2023.
22. The formulation and development of the actual Help to Buy scheme therefore appears to have been concluded by the time the information relevant to the request was created. The Commissioner therefore considers that it would be unlikely that the information would relate to the formulation or development of the Help to Buy policy. However, it may still relate to the Help to Buy policy if, for example, it an analysis of lessons learnt from that policy making process.
23. Having had sight of the withheld information, although it relates to the Help to Buy scheme, the Commissioner does not consider that it relates to the formulation or development of that policy, but to the proposed exit of affected staff following the closure of the scheme.
24. Whilst the Commissioner acknowledges that there was live decision making in respect of the redeployment of staff who had managed the

scheme, he must consider whether decisions on this issue constitute government policy.

25. It appears that Homes England was responsible for redeploying its staff who managed the scheme, and as Homes England's sponsoring department, the DLUHC had to approve these proposals.

26. The Commissioner's own guidance in respect of section 35 defines government policy as being:

"the process by which governments translate their political vision into programmes and action to deliver 'outcomes', desired changes in the real world."

27. Although the Help to Buy scheme itself clearly falls within that description, the Commissioner considers that the withheld information relates to the operational issues of Homes England arising from the closure of the scheme. This is an internal human resources issue for Homes England, albeit one that requires approval from the DLUHC.

28. The Commissioner has also taken the factors which indicate the formulation and development of government policy outlined in paragraph 18 of this notice into consideration and notes:

- that the decision on the redeployment of staff does not need to be made either by the Cabinet or a relevant minister,
- that there is no particular change or outcome in the real world as a result of the matter, and;
- the consequences of the decision will not be wide-ranging

29. The Commissioner does not accept therefore that the information relates to the formulation or development of a government policy.

30. The Commissioner has therefore concluded that the DLUHC were not entitled to rely on section 35(1)(a) FOIA to refuse this request as the exemption is not engaged. Having concluded that that the exemption is not engaged, there is no need to consider the public interest test. The Commissioner has therefore gone on to consider the DLUHC's reliance on section 43(2) FOIA in respect of the withheld information.

### **Section 43(2) – prejudice to commercial interests**

31. Section 43(2) provides 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)."

32. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner considers 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 must 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, i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

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

33. The DLUHC has argued that the disclosure of the withheld information would prejudice the commercial interests of Homes England.
34. The term 'commercial interests' is not defined in FOIA; however, the Commissioner has considered his guidance on the application of section 43<sup>1</sup>, 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."
35. The DLUHC considers that the information is commercial in nature as it relates to Homes England's ability to effectively manage the redeployment of staff to deliver its business objectives. It has further stated that following its approval of the business case in question, it

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<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

would be subject to consultation with the relevant trade union and any affected staff.

36. The DLUHC has argued that the premature disclosure of the information would be likely to damage Homes England's (and DLUHC's) relationship with all stakeholders involved, and would in turn prejudice Homes England position in negotiations.
37. The Commissioner considers that whilst it is plausible that disclosure could make the negotiations with the Trade union and affected staff more difficult, it is not clear that the impact this would have on delivering the 'business objectives' of Homes England would be on a commercial interest, and neither is it clear that Homes England undertakes any commercial activity.
38. Further, whilst disclosure may have an impact on the financial interests of Homes England, financial interests are not necessarily the same as commercial interests.
39. Additionally, the Commissioner would refer to his guidance that where a public authority argues that the commercial interests of a third party would be prejudiced, that:  
  
"It is not sufficient for [the PA] to simply speculate about the prejudice which might be caused to the third party's commercial interests. [It will] need to consult them for their exact views in all but the most exceptional circumstances."<sup>2</sup>
40. The Commissioner has been provided with no evidence that DLUHC has consulted with Homes England, and the Commissioner does not accept that the DLUHC's knowledge of such issues would be sufficient to be relied on.
41. Taking all of the above factors into consideration, the Commissioner is not satisfied that the DLUHC has demonstrated that the information has fulfilled the first criteria of section 43 outlined in paragraph 32 of this notice, and as it has fallen at the first hurdle, he has concluded that the DLUHC was not entitled to rely on section 43(2) to refuse the requested information. As the Commissioner is not satisfied that section 43(2) is engaged, it is not necessary for him to consider the public interest test.

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>



42. He has therefore gone on to consider whether the DLUHC was entitled to rely on section 40(2) FOIA in respect of a small amount of information.

### **Section 40 – personal data**

43. 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.
44. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
45. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA). If it is not personal data then section 40 of the FOIA cannot apply.
46. 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.
47. **Is the information personal data?**
48. Section 3(2) of the Data Protection Act 2018 defines personal data as:  
"any information relating to an identified or identifiable living individual."
49. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
50. 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.
51. 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.
52. The withheld information in this case includes the personal data of junior civil servants who were copied into the submission and supporting correspondence. Further, as the Commissioner has concluded that the



DLUHC was not entitled to rely on sections 35(1)(a) or 43(2) FOIA, there is some additional information which constitutes the personal information of either the requester or third parties which the Commissioner (as a responsible regulator) has included in this analysis. This is the information identified by the DLUHC as 'supporting information' associated with the Business Case other than its email dated 23 March 2023.

53. The Commissioner is satisfied that this information both relates to and identifies the individuals in question. It therefore falls within the definition of "personal data" in section 3(2) of the DPA.
54. However, the fact that information constitutes third party personal data does not automatically exclude it from disclosure under FOIA. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focused here on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
55. 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.
56. 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 UK GDPR**

57. 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".<sup>3</sup>

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<sup>3</sup> Article 6(1) goes on to state that:-

"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:-

58. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.

59. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interest**

60. 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. Interests may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

61. The complainant has stated in their request for an internal review that they believe that the requested information concerned the potential loss of staff jobs as they believed that Homes England was disregarding employee rights to redundancy packages.

62. The Commissioner accepts that the complainant has a legitimate interest in disclosure of this information.

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"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".

### **Is disclosure necessary?**

63. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
64. The Commissioner does not consider that disclosure of the names of junior civil servants copied into the business case submission, or the remaining third party information is necessary to meet their legitimate interest.
65. The Commissioner would highlight that it is common practice for a public authority to argue that the names of junior officials are exempt from disclosure under FOIA on the basis of section 40(2) as disclosure would contravene the principles set out in Article 5 of the GDPR. Furthermore, unless there are very case specific circumstances, the Commissioner accepts that the names of the junior officials are exempt from disclosure on the basis of section 40(2) of FOIA. This is in line with the approach taken in the Commissioner's section 40 guidance<sup>4</sup> and previous decision notices.<sup>5</sup>
66. The Commissioner does not consider that knowing the names of junior civil servants, or the information regarding the other third party, would assist the complainant in providing details of the business case. He has therefore determined that disclosure of the names of the officers in question, and supporting information other than that created by the DLUHC on 23 March 2023 is not necessary, as he believes disclosure of the business case itself will serve their legitimate interest.
67. The Commissioner is therefore satisfied that section 40(2) is engaged in respect of the personal information of junior civil servants who were copied into the business case, and all documents which make up the

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf)

<sup>5</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022310/ic-114449-b7p7.pdf>

supporting correspondence other than the email created by the DLUHC on 23 March 2023.

## **Other matters**

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68. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters of concern:

### **Correct access regime**

69. In this case, the DLUHC failed to recognise that the complainant's own personal data formed part of the request and did not consider this part of the request under the Data Protection Act 2018 (DPA). Whilst the Commissioner cannot require a public authority to take action under the DPA via an FOIA decision notice, in view of his decision that part of the requested information is the personal data of the complainant, the DLUHC should consider providing a response to the complainant under the DPA in respect of the information they requested.
70. The Commissioner would point out that this does not necessarily mean that the complainant is entitled to receive this information. There are a number of reasons why a data controller may be entitled to withhold information from disclosure under a SAR – this includes where the information is also the personal data of a third party. There will therefore inevitably be some information that the complainant is not entitled to receive either via the FOIA or via a SAR.

## Right of appeal

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71. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

72. 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.

73. 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 .....**

**Catherine Dickenson  
Senior Case Officer  
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Wycliffe House  
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SK9 5AF**