

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

### **Decision notice**

**Date:** 26 June 2020

**Public Authority:** Homes England  
**Address:** Windsor House  
50 Victoria Street  
London  
SW1H 0TL

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

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1. The complainant has requested information from Homes England concerning the approval of a housing management agreement under section 27 of the Housing Act 1995.
2. HE disclosed some information but withheld the remainder citing the following sections of the FOIA: 21 -information already available; 31 – law enforcement; 38 – health and safety; 40(2) – third party personal data and 42 – legal professional privilege. The complainant challenged the application of sections 31 and 40(2) only.
3. The Commissioner’s decision is that Homes England has failed to demonstrate that section 31 is engaged, and that it is entitled to rely on section 40(2) for the withheld personal data.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld under section 31 of the FOIA in the document entitled RFI2414-IR-Annex A.pdf
5. 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

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6. On 3 July 2018 the complainant wrote to the Regulation Committee, a statutory committee of Homes England (HE), and requested information in the following terms:

*'to see all correspondence between yourselves and LBH / HfH in relation to this matter as well as the minutes of the meetings held between yourselves and HfH, including the Chair of the HfH Board, (redacted), and any other such contacts in addition to minutes of the deliberations of your own decision-making panels / instances leading up to the section 27 approval.'*

7. To clarify, 'this matter' was the approval by the Regulation Committee of a management agreement between the London Borough of Haringey (LBH) and Homes for Haringey (HfH).
8. Section 27 of the Housing Act 1985 permits a local authority landlord (in this case LBH) to enter into a contract with a third party (HfH) whereby the third party undertakes functions on behalf of the landlord in respect of tenanted properties.
9. Within HE, the Regulation Committee was formally referred to as the Regulator of Social Housing (RSH). On 1 October 2018, legislation was enacted that made the RSH an independent entity in its own right. As the request was made prior to this date, when the RSH was still a statutory committee of HE, HE dealt with it in consultation with the RSH.
10. HE responded on 1 November 2018. It provided some information falling within the scope of the request, but withheld other information under sections 21, 31, 38 and 40(2) of the FOIA.
11. The complainant requested an internal review of the request on 13 February 2019. HE responded on 17 April 2019 and disclosed the name and position of the s.27 signatory but maintained its reliance on the exemptions in its initial response.

## Scope of the case

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12. The complainant contacted the Commissioner on 29 May 2019 to complain about the way his request had been handled. He did not initially challenge the exemptions applied by HE, but was not satisfied that HE had disclosed all the information falling within the scope of the request.
13. The Commissioner sent a letter to HE asking a series of questions concerning the searches undertaken to locate information falling within the scope of the request. HE responded, disclosing more information but redacting some third-party personal data in line with its original disclosures, and applied section 42 – legal professional privilege, to the additional disclosures.
14. Having seen these additional disclosures, the complainant was concerned about the personal data redactions as he considered they may shed light on the decision-making process. He also became dissatisfied with HE's application of section 31 to his request – law enforcement, and wished to challenge it. He did not challenge the application of sections 21, 38 and 42 of the FOIA.
15. The Commissioner wrote to HE again asking it to expand on its application of sections 40(2) and 31. HE responded, disclosing some of the personal data but maintaining its reliance on section 40(2) for the remainder of the personal data identified. It also disclosed two documents previously withheld under section 31. In addition to the personal data redactions, it continued to withhold information in the document entitled RFI2414-IR-Annex A.pdf under section 31.
16. The Commissioner therefore considers the scope of the case to be whether HE is entitled to rely on section 31 for information redacted from RFI2414-IR-Annex A.pdf, and section 40(2) for the redacted third party personal data.

## Reasons for decision

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17. Section 31 is designed to protect the disclosure of information which would otherwise prejudice the law enforcement activities of public authorities.
18. HE is relying on 31(1)g of the Act:

*'Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice -*

*(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),*

HE maintains that the applicable purpose specified in subsection 2 is:

*(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,*

This means that HE considers that disclosure of the information would prejudice the regulatory function of the RSH

19. Under the Housing Regeneration Act 2008 (HRA), the RSH is given regulatory powers that allow it to set regulatory standards, against which it can consider compliance by registered providers of social housing. Where the RSH receives information or a complaint that a registered provider is failing to meet one or more of the consumer standards it convenes a Consumer Regulation Panel (CRP). The CRP's role is to determine whether there was evidence of failure by the provider and reach a decision about whether there a breach of the consumer standards with serious detriment. The CRP then decides if the issue warranted further investigation. Discussions and decisions are recorded in the CRP notes.
20. The document to which section 31 redactions have been applied - RFI2414-IR-Annex A.pdf - comprises a number of separate documents that all concern CRP notes and decisions, leading up to the section 27 approval. RFI2414-IR-Annex A.pdf also contains section 40(2) redactions (see later) and section 42 redactions (not challenged).
21. Section 31 is a prejudiced based exemption. The Commissioner's approach to the prejudice test is based on that adopted by the Information Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030, 17 October 2006) (referred to as 'Hogan')<sup>1</sup>. This involves the following steps:

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

- Identifying the 'applicable interests' within the relevant exemption
- Identifying the 'nature of the prejudice'. This means showing that the prejudice claimed is 'real, actual or of substance', and showing that there is a 'causal link' between the disclosure and the prejudice claimed.
- Deciding on the 'likelihood of the occurrence of prejudice'.

#### *Applicable interests*

22. In this case, the applicable interests identified by HE is the RSH's statutory functions of '*ascertaining whether circumstances exist which would justify the exercise of regulatory and enforcement powers*'.
23. The Commissioner accepts that the applicable interests identified by HE fall within sections 31(1)g and 31(2)c, and as CRP notes concern complaints against LBH to the RSH, they relate directly to its regulatory and enforcement powers.

#### *Nature of the prejudice*

24. The next question for the Commissioner to consider is the nature of the prejudice claimed by HE.
  25. HE has stated that self-referrals from providers, and complaints from third parties form a significant proportion of the intelligence relied on by the RSH to perform its regulatory functions. It maintains that if providers / third parties become aware of referrals and complaints being made public in their entirety, it would have a cooling effect on the provision of information to the regulator. Providers would be dissuaded from making referrals and individuals would be dissuaded from raising concerns or complaints. Consequently, this will make it more difficult for the regulator 'to perform its statutory functions in a timely, efficient and proportionate fashion'.
  26. HE also believes that if providers are able to see how the regulator reached its conclusions in this case, it may use the information to manipulate future investigations into their performance and compliance activities. This again would make it more difficult for the standalone regulator to achieve its regulatory functions.
  27. Combined, these prejudices would:
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*'potentially result in an overall lowering of the standards of performance of registered providers and an undermining of the public confidence in regulation of registered providers. This will increase the cost and difficulty associated with the standalone regulator achieving its statutory regulatory functions.'*

*Likelihood of the prejudice*

28. Having established the nature of the prejudice – that release of the information would dissuade people from reporting matters to the regulator and enable providers to manipulate the process, the Commissioner now considers the likelihood of this occurring.
29. In the Hogan case, the Tribunal said: *"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."* (paragraph 33).
30. The first limb identified relates to 'would'. 'Would' is therefore taken to mean more probably than not i.e. more than a 50% chance of disclosure causing the prejudice. The second limb identified relates to 'would be likely'. This means that there must be more than a suggestion or hypothetical possibility of the prejudice occurring, so although the probability is less than 50%, it is still a real and significant risk. This interpretation was relied on by the Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006<sup>2</sup>), who said *"We interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk."*
31. The threshold of likelihood that HE is relying on in this case is 'would be likely to' – i.e. there is a real and significant risk.
32. The Commissioner notes that a significant amount of the information in the CRP notes have already been disclosed to the complainant. This includes the nature of the complaint / concerns, and both LBH's and

HfH's response to these i.e. evidence of action / compliance. The redacted information covers the analysis of this already disclosed information, to determine compliance and any possible actions.

33. HE considers that disclosure of the remaining information would have a 'cooling effect' on the provision of information in the future from providers and individuals if it was known that this information could be made publicly available, particularly as this often relies on the voluntary supply of the information. However, chilling effect arguments are stronger when a case is live and in this instance, the matters to which the CRP notes relate had concluded and the section 27 HRA application at the centre of this request had been decided by the time the request was made. Whilst the chilling effect argument may still carry some weight in terms of deterring the future voluntary disclosure of information concerning compliance issues, the Commissioner considers that in this case the argument is more hypothetical than real. This is in part because a significant amount of information concerning the CRP notes has already been disclosed, but also because disclosure of the information could equally have the opposite effect to that anticipated by HE. If individuals and providers are able to see how the regulator is making regulatory decisions, based on evidence and sound analysis, it could inspire confidence and encourage more voluntary disclosure and openness. The Commissioner does not therefore accept that the likelihood of prejudice anticipated by HE due to the chilling effect presents a real and significant risk.
34. In addition to the chilling effect arguments, HE also considers that 'safe space' arguments are relevant in this case. It states that:

*'It is vital to maintain a safe space in which to consider and record information about providers, from whatever source, about performance against the standards. Seeing matters in the round and considering intelligence from across the organisation is likely to result in better, and more proportionate and consistent, regulation.'*

*'It is also vital that in the course of its deliberations about compliance with regulatory standards, the standalone regulator should be able to test arguments for and against regulatory actions and to do so free from scrutiny. Regulation staff must feel at liberty to engage in a candid exchange of information and to record the arguments considered in minutes and decision-making logs. Again, this helps ensure that the standalone regulator is able to perform its statutory functions appropriately, achieving consistency, proportionality, parity and fairness in decision making and regulatory engagement.'*



35. As with chilling effect arguments, those concerning 'safe space' are stronger when the matter is live. The Commissioner has already determined that this matter was not live at the time of the request. She is also sceptical of the standard arguments sometimes put forward by public authorities that the disclosure of decisions will hamper the candid exchange of views and subsequent adequate record keeping. In the context of the withheld information, it is information that should be recorded in the normal course of business in response to complaints made to the regulator. The Commissioner does not consider it sensitive and she is not convinced that regulation staff would compromise their integrity and professionalism by curbing their views or reducing the adequacy of their records. As the records are justifying their decisions and essentially holding them and the regulator to account for any regulatory action, it is hard to imagine a situation where such records would be compromised or reduced due to concerns about safe space arguments; the Commissioner considers that in all likelihood scrutiny of such decisions would have the opposite effect and making recordkeeping more robust.
36. The Commissioner concludes that the prejudice anticipated by HE by disclosure of the information withheld under section 31 does not pass the threshold of 'would be likely' – the arguments are theoretical and too distanced from the facts of the case, and so the Commissioner cannot see any causal link between disclosure and the prejudice suggested. She therefore determines that section 31 is not engaged, and so has not gone on to consider the public interest test.

#### **Section 40 - personal information**

37. 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.
38. In this case the relevant condition is contained in section 40(3A)(a)<sup>3</sup>. 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').
39. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

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<sup>3</sup> As amended by Schedule 19 Paragraph 58(3) DPA.



Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

40. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

*Is the information personal data?*

41. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

42. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
43. 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.
44. 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.
45. HE initially withheld the names, email address and contact details of some its staff and external third parties. During the course of the investigation, HE decided to disclose the names of senior, public facing employees, along with names of senior, public facing external individuals. By the end of the investigation, HE was withholding the personal data of employees who were not operating at a senior level and those who did not have public facing roles, along with external people not operating at a senior level or whom would have no expectation that their personal data would be disclosed (for example complainants). Given the various disclosures during the investigation, the Commissioner confirms that the withheld personal data being considered in this decision notice relates to all the disclosures made by HE to the complainant in its letter to him dated 28 January 2020.
46. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

47. Article 5(1)(a) of the GDPR states that:

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

48. 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.

49. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

*Lawful processing: Article 6(1)(f) of the GDPR*

50. 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>4</sup>.*

51. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

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<sup>4</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) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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".*

- (a) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- (b) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- (c) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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

### *Legitimate interests*

53. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
54. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
55. The complainant has concerns about the handling of the section 27 application and specifically, who was involved in and consulted about the application. Given that some of the personal data has now been disclosed, the complainant remains concerned that some personal data is still being withheld raising questions about consistency and transparency.

### *Is disclosure necessary?*

56. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
57. In this case the withheld personal data relates to staff involved with the section 27 application and CRP notes, and external third parties who were not operating in a public facing role or would not expect disclosure of their personal data. Although HE has disclosed the personal data of senior staff and those in public facing roles, this does not allay the

complainant's concerns about consistency and transparency as the disclosure does not provide him with all the people who were involved.

58. The Commissioner therefore accepts that for completeness of knowing all who were involved in the s27 application, disclosure of the withheld personal data is necessary to meet the complainant's legitimate interests, and wider public interest of accountability and transparency. However, this does not extend to email addresses where the person's name is already visible or to other contact details. The Commissioner does not deem that this personal data would add anything to understanding who was involved in the section 27 application.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

59. Having determined that disclosure of the personal data is necessary to meet the legitimate interests outlined above, this must now be balanced against these data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
60. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individuals expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
61. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
62. Having disclosed the names of senior staff and external individuals with public facing roles, HE states:

*'We maintain our position that disclosure of the names and job titles of other individuals (i.e. those who were not at a senior level, did not have sufficiently public facing roles, or (save as above) were not employees of the HCA, should not be disclosed.... These persons were acting in accordance with organisational requirements as employees. Such individuals would have no expectation that their identities would be revealed because their jobs were not sufficiently senior or sufficiently public facing to the world at large. As such disclosure of their names or job titles would breach the lawfulness, fairness and transparency principle and the purpose limitation principles.*

63. Having viewed the withheld personal data, the Commissioner is satisfied that the internal and external staff to which it applies were operating at a level and in a role where they would not reasonably expect their data to be disclosed to the world at large under a FOIA request. She also considers this applies to complainants.
64. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest in disclosure to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
65. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

*The Commissioner's view*

66. The Commissioner has therefore decided that HE was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Right of appeal

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67. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

68. 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.
69. 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 .....**

**Andrew White**  
**Head of FOI Complaints and Appeals**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**