

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 October 2012

Public Authority: Sheffield Homes

Address: PO BOX 1283
S1 IUJ

Decision (including any steps ordered)

1. The complainant has requested the part B minutes of Sheffield Homes' AGM of 20 September 2011. Sheffield Homes responded outside the time for compliance. It initially provided a redacted version of the minutes and withheld the document "project business case" relying on section 36(2)(c) of the FOIA as disclosure would otherwise prejudice the effective conduct of public affairs and section 43(2) in respect of the redactions made to the part B minutes as the information was commercially sensitive. During the investigation, Sheffield Homes also withdrew its reliance on section 36(2)(c) in respect of the project business case and instead relied on section 41 as the document had been provided in confidence.
2. The Commissioner's decision is that Sheffield Homes has incorrectly applied section 43(2) and section 41 to the withheld information. The Commissioner has also decided that in responding outside 20 working days, Sheffield Homes has breached section 10 of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide the withheld information.
4. Sheffield Homes 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 15 October 2011 the complainant wrote to Sheffield City Council (the council) and requested information in the following terms:

"Would you please arrange for the provision of information showing why Sheffield Homes, on the basis of advice from the council, had a 'Part B' meeting after their AGM.

It has been established that so-called secret meetings can only be held for specific reasons, and these are covered by the Freedom of Information Act and Data Protection Act.

Please provide the rationale as to why the Part B meeting was held, citing the clauses of the FOIA or DPA that were claimed to be engaged.

Please provide the minutes of that Part B meeting, redacted if legal exemptions can be justified."

6. The council responded on 23 November 2011. It stated that as Sheffield Homes is an external body, the complainant should direct his request to them. Sheffield Homes has confirmed that the council forwarded the complainant's request to them on 15 November 2011.
7. Sheffield Homes then responded to the request on 25 January 2012. It provided a redacted version of the part B minutes of the meeting held on 20 September 2011. The part B minutes discussed the Arms Length Management Organisation (ALMO) Business Case which is also known as the project business case. Sheffield Homes withheld this document under section 36 of the FOIA as it determined that to release it would prejudice the effective conduct of public affairs and it was not in the public interest to do so.
8. The complainant asked for an internal review on 25 January 2012. Following the Commissioner's involvement, Sheffield Homes provided the complainant with the results of its internal review on 3 March 2012. It stated that it upheld its previous decision to rely on section 36 to withhold the redacted parts of the part B minutes and the project business case document. It also considered that section 40 applied because some of the information was personal data, that section 41 applied as the information was confidential, and that section 43 applied as the information was commercially sensitive.

Background

9. Sheffield Homes is an ALMO which manages the council houses on behalf of the council. The management agreement for Sheffield Homes to do this is due to expire in March 2014. At the time of the request Sheffield Homes and the council were in the process of deciding the future of the management of council housing in Sheffield. This included a consultation process with stakeholders, in particular secure tenants. The withheld information in this case is Sheffield Homes' business case for its continuation as an ALMO for the council houses in Sheffield.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He initially complained about Sheffield Homes' delay in responding and in providing the results of an internal review. He asked the Commissioner to issue a decision notice in respect of these matters. Once he had received the internal review response, he also complained about Sheffield Homes' decision to withhold information in response to his request.
11. During the course of the investigation, Sheffield Homes initially sought to rely primarily on section 36(2)(c). However, after lengthy consultation with Sheffield Homes on the matter, it transpired that its reliance on section 36 could not be maintained. Therefore the council confirmed that it was relying only on section 43 in respect of the redacted parts of the part B minutes, and section 41 with regard to the project business case.
12. The Commissioner considers the scope of this complaint to be the delay in responding and Sheffield Homes' decision to rely on section 41 and section 43 withhold the requested information.

Reasons for decision

Section 41 – Information provided in confidence

13. Sheffield Homes relies on section 41 to withhold the project business case and the associated appendices.
14. Section 41(1) of FOIA states that:

"Information is exempt information if-

- a) *it was obtained by the public authority from any other person (including another public authority), and*
 - b) *the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*
15. In this case Sheffield Homes has argued that the project business case was obtained from the council, and therefore it considers that the information was obtained by a third party. The Commissioner has had read the project business case and considers that it is a joint document between the council and Sheffield Homes. Logos for both public authorities appear on the front page and whilst the project sponsor is the council's Cabinet Member for Homes and Regeneration, there is a lead officer from both public authorities. In the case of Sheffield Homes, the chief executive was the lead officer. In addition to this, the list of appendices to the project business case states which public authority owns each document. Out of 14 appendices, Sheffield Homes owns 9. These appendices are referred to throughout the document.
16. The Commissioner raised this matter with Sheffield Homes. It maintained its position that the document had been produced by the council and then shared it with Sheffield Homes on a confidential basis to share it with the Board. However, it also confirmed that its *"involvement was only to provide information by people who were involved in the service delivery on a day to day basis"*. It has therefore acknowledged that staff from Sheffield Homes have been involved in the creation of the document.
17. Whilst the Commissioner recognises that the report has been written primarily from the council's point of view as it was not a prerequisite that Sheffield Homes will have been the ALMO chosen to carry on the council housing provision should it have been decided to retain the ALMO business model. However, it is clear that it was written with input from Sheffield Homes as many of the appendices owned by Sheffield Homes are referred to throughout the document.
18. Further to this, the council's Future of Council Housing report to Cabinet¹ on 19 October 2011 explicitly stated that Sheffield Homes was involved in the creation of the information contained in the project business case. This is demonstrated in the following excerpts:

¹ <http://meetings.sheffield.gov.uk/council-meetings/cabinet/agendas-2011/agenda-19th-october-2011>

- *“The Advisory Group developed a list of ‘tenant and leaseholder priorities’ for the future housing management model ... The priorities were further expanded and developed by Members and Council Officers, with input from Sheffield Homes.”*
 - *“This culminated in a workshop on 20 September 2011 with officers from both the Council and Sheffield Homes where both options were compared against key criteria.”*
19. The list of tenant and leaseholder priorities became the key criteria and these are referred to throughout the project business case. In addition to this, the main body of the project business case consists of comparisons of the two options against the key criteria. Given the statements above, it is likely that these were taken from the workshop of 20 September 2011 and therefore contain information which has been created by Sheffield Homes.
20. The Commissioner acknowledges that the project business case has been written by the council. However, the content of the document is clearly a collaborative effort. This approach is consistent with the Tribunal in *Department of Health v Information Commissioner (EA/2008/0018)* which found that whilst a contract had been compiled by a third party, it had been drafted with the input of the Department of Health and was therefore not obtained from a third party for the purposes of section 41:
- “If information has been provided by e.g. DOH, its inclusion in a document compiled by Methods [the third party] subsequently or a draft does not then transfer “ownership” of the information to Methods for the purposes of considering the Contract.”*
21. The Commissioner therefore considers that the project business case has not been obtained from a third party and consequently section 41 is not engaged. As such, the Commissioner has not gone on to consider whether disclosure would constitute an actionable breach of confidence.

Section 43(2) – Prejudice to Commercial Interests

22. Section 43(2) of the 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).”

This is a qualified exemption and is therefore subject to the public interest test, if engaged.

23. Broadly speaking, section 43(2) protects the ability of a party to participate competitively in a commercial activity, for example the purchase and sale of goods or services. The successful application of section 43(2) is dependent on a public authority being able to demonstrate that the following conditions are satisfied –
- Disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it).
 - In all the circumstances, the weight of the public interest in maintaining the exemption outweighs the public interest in disclosure.
24. Therefore, the first issue for the Commissioner to assess is whether disclosure could result in the prejudice that the exemption is designed to protect against. If this is not found to be the case, the exemption is not engaged and there is no requirement to go on to consider the public interest factors associated with disclosure.
25. Adopting the now standard approach set out by the Information Tribunal in *Hogan v Information Commissioner and Oxford City Council* (EA/2005/0026 and EA/2005/0030), the Commissioner considers that the framework for assessing the test of prejudice involves the consideration of three questions;
- What are the applicable interests within the exemption?
 - What is the nature of the prejudice being claimed and how will it arise?
 - What is the likelihood of the prejudice occurring?

Applicable interests

26. The term 'commercial interests' is not defined in the FOIA, however, it is understood to have a broad meaning, encompassing activities which have both a direct and an indirect effect on commercial activities. This will therefore include the buying or selling of goods and services as well as information which can be shown to affect a person's ability to undertake such activities effectively.
27. The withheld information consists of summarised points of the discussions that took place at the Board Meeting regarding the project business case. Sheffield Homes' position is that section 43(2) is engaged as the information "*may have repercussions for labour relations which the company would wish to manage properly in order to minimise*

disruption to service delivery." This is the only argument put forward by Sheffield Homes in support of its application of section 43.

28. The Commissioner cannot see a link between labour relations and any commercial activity that Sheffield Homes is engaged in and Sheffield Homes has not provided any information to demonstrate such a link. The Commissioner can envisage a situation where discussions about the implications of a business case on the continuation of a company could have an impact on the company's ability to compete in its market, but this has not been argued by Sheffield Homes in this case. The Commissioner therefore considers that the withheld information in this case does not relate to any commercial activity, either directly or indirectly.
29. Given the nature of the information and the arguments advanced by Sheffield Homes, the Commissioner is not satisfied that the information relates to commercial interests. He therefore considers that section 43 is not engaged.

Procedural findings

30. Section 10 of FOIA states that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

31. The complainant made his request for information on 15 October 2011 to the council. Sheffield Homes has confirmed that it received the request from the council on 15 November 2011.
32. Sheffield Homes did supply its response to the complainant's request. However, it did not do so until 25 January 2012.
33. The request was not therefore responded to within twenty working days as required by section 10.
34. The Commissioner's decision is therefore that the council breached section 10 of the FOIA.

Other matters

35. Although they do not form part of this decision notice, at the complainant's request, the Commissioner wishes to highlight the following:

Internal review

36. Paragraph 39 of the Code of Practice issued under section 45 of the FOIA (the 'Code') recommends that complaints procedures should:

"....provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."

37. Paragraph 40 of the Code states that in carrying out reviews:

"The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint."

38. As he has made clear in his published guidance on internal reviews, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner's view of a reasonable time for completing an internal review is 20 working days from the date of the request for review. In this case the Commissioner notes that the public authority took longer than this to provide an internal review. The public authority should ensure that internal reviews are carried out promptly in future.

Right of appeal

39. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

40. 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.
41. 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

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