

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 May 2023

Public Authority: Department for Levelling Up, Housing and Communities

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested from the Department for Levelling Up, Housing and Communities ("the DLUHC") information about the salary and job evaluation scoring for a post. The DLUHC withheld the requested information under section 43(2) of FOIA.
2. The Commissioner's decision is that the DLUHC was not entitled to withhold the requested information under section 43(2).
3. The Commissioner requires the DLUHC 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 31 October 2022, the complainant wrote to the DLUHC and requested information in the following terms:

“Background

Over the Summer, Homes England advertised on Civil Service jobs a job called Executive Director MPP (ED MPP). The remuneration in the advert was for £184,000. Please see attached the Candidate Pack.

As DLUHC is the Sponsor Department for Homes England, a salary of the level of £184,000 will require Secretary of State approval, and the Government’s guidance for Approval of Senior Pay: Senior Pay Controls Process (September 2021) states at Chapter 2,1 that the CST (Chief Secretary to the Treasury) must approve a remuneration when the appointment attracts a total remuneration at or above the threshold of £150,000, and where a performance bonus threshold of £17,500 is exceeded.

FOIA Enquiry

I would like to make the following information request under the Freedom of Information Act 2000 (FOIA):

- 1. Do you hold a record of a “Pro forma for application for CST approval” (or submission, business case, or any similar document) for the job role ED MPP from Homes England, or the relevant DLUHC Sponsor Team (which in turn would be sent to the Civil Service Workforce Policy and Reward (CSWPR) team for clearance with the CST) ?**
 - 2. Do you have a record of a date on which the CST gave clearance for the ED MPP advertised Pay (£184,000) ?**
 - 3. Do you hold a record of any JESP assessment for this ED MPP post ? If so, then can you give me the total score and the score broken down by JESP factors.**
 - 4. If there is no JESP score held, then do you hold a record of a HAY job evaluation assessment ? If so, then what was the HAY total score, the HAY score broken down by HAY factors (score profile), and the HAY Group Reference point ?”**
6. The DLUHC responded on 28 November 2022. It stated that all of the requested information was withheld under section 35(1)(a).

7. Following an internal review, the DLUHC wrote to the complainant on 10 March 2023. It revised its position and provided a more granular response to the request:
 - In respect of part 1, it confirmed information was held but refused to provide it under section 43(2).
 - In respect of part 2, it confirmed information was held and disclosed it.
 - In respect of part 3 it denied that information was held.
 - In respect of part 4, it confirmed information was held but refused to provide it under section 43(2).

Scope of the case

8. The complainant contacted the Commissioner on 5 February 2023 to complain about the way their request for information had been handled.
9. The basis of the complaint was that the DLUHC was incorrect to withhold information ("**HAY job evaluation score information**") under section 43(2). The Commissioner notes that this will be the information sought by part 4 of the request.
10. During the course of investigation, the DLUHC informed the Commissioner that, whilst it had handled part 1 of the request as seeking a copy of the "**Pro forma for application for CST approval**", it now considers, having had further correspondence with the complainant, that part 1 only seeks the confirmation of whether the process had been followed, rather than an actual copy of the document. The Commissioner, having been provided with the 'further correspondence' by the complainant, notes that the complainant has written:

"My request is not about the full disclosure of the CST proforma. That would be unreasonable and not appropriate, and not in the public interest. There will be pay market data and specific role information, which is not associated with job size, that informs the CST pay decision."
11. The Commissioner therefore recognises that part 1 of the request only seeks confirmation of whether the process has been followed. As the DLUHC has provided confirmation of this, and this has not been disputed by the complainant, the Commissioner will not consider this aspect further.

12. The Commissioner therefore considers that the scope of his investigation is whether the DLUHC is entitled to withhold that held information that would fall within the parameters of part 4 of the request.

Reasons for decision

Section 43(2) – Commercial interests

13. 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).”

14. 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?

15. The DLUHC has informed the Commissioner that it **“does not hold a record of the HAY total score for this role, nor the HAY score broken down by HAY factors (score profile).”**
16. However, it does hold a record of the **“HAY Group Reference level at which the ED MPP role was assessed”**. This is contained within a section of the ‘Pro forma for application for CST approval’ that is referenced in part 1 of the request. The DLUHC has provided a copy of this section to the Commissioner.
17. The information withheld in this case is information relating to the salary and job evaluation scoring of a post.

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

18. 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

19. 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.
20. 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.
21. 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).
22. 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).

The DLUHC's position

23. The DLUHC has argued to the Commissioner that disclosure of the information would be likely to prejudice the commercial interests of a third party, namely Homes England. The DLUHC has explained to the Commissioner that it has corresponded with Homes England on this matter, and that Homes England has argued that the disclosure of the information "**could lead to a negative effect on future recruitment activity and may result in a fewer number of applications. This**

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

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."

24. Homes England 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."**
25. The DLUHC has therefore advanced arguments based on prior knowledge of Home England's concerns. The Commissioner notes that the DLUHC elaborated that **"It is the Department's view that disclosure of the withheld information, if aligned incorrectly to a third party's methodology, could result in potential candidates considering a vacancy to be lesser or greater than it is. This in turn could lead to a fewer number of applications, which would have an adverse impact on Homes England's ability to compete with similar organisations for recruitment purposes."**
26. The DLUHC has further elaborated that **"There is also legitimate concern that disclosure of the withheld information would undermine confidence in the pay and grading process adopted by Homes England. The requested information relates to an internal assessment process which, if published, could lead to dissatisfaction amongst employees whose roles have been assessed at a different level to another within the same grade, and prompt requests for re-evaluations. It would clearly not be in the public interest for a public body's resources to be redirected in this way."**

The Commissioner's conclusion

27. The Commissioner has considered the DLUHC's arguments and specifically the claimed prejudice.
28. Having done so, the Commissioner is not convinced that disclosure of the information would cause the claimed prejudice. Whilst it is appreciated that Homes England may recruit more widely than other public authorities, and seek to recruit individuals from the private sector, the Commissioner does not consider that the DLUHC has sufficiently evidenced that there would be a causal affect between disclosure and Homes England's ability to recruit and fulfil its purpose any more than other public authorities.

29. 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.
30. 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.
31. The Commissioner also notes a recent decision (IC-214653-Y5J8³) (in respect of an information request made directly to Homes England) in which he considered Homes England's application of section 43(2) to withhold similar information based on the same arguments as those advanced here. In that case, the Commissioner found that Homes England was not entitled to rely upon section 43(2) and ordered disclosure of the information.
32. Having considered the above, the Commissioner has concluded that the DLUHC 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://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query&query=IC-214653-Y5J8>

Right of appeal

33. 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

34. 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.
35. 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
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