



Homes
England

Making homes happen

Date: 22 January 2021
Our Ref: RFI3258
Tel: 0300 1234 500
Email: infogov@homesengland.gov.uk

██████████
By Email Only

Windsor House
Homes England – 6th Floor
50 Victoria Street
London
SW1H 0TL

Dear ██████████

RE: Request for Information – RFI3258

Thank you for your recent email, which was processed under the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR).
You requested the following information:

Mr Ken Glendinning of Homes England is quoted in the Henley Standard as saying:

"As part of the examination, the costs and infrastructure requirements have been considered by the inspector. These have also been tested by an independent viability assessment commissioned by South Oxfordshire District Council, the most recent update of this was in July."

Please can you provide evidence that the Inspector has considered the costs of the Chalgrove Airfield site, as this was not included within the Examination in Public held by the Inspector, and participants were advised that the viability of the site would not be discussed.

Secondly, reference the independent viability assessment, please could you advise if there is any connection, contractual or otherwise, between the author of that report and Homes England?

Thirdly, please provide the detail of any viability assessment carried out by Homes England, and the basis upon which that viability assessment was made.

Response

We can confirm that we do hold some recorded information that falls within the scope of your request. We will address each of your points in turn.

Please can you provide evidence that the Inspector has considered the costs of the Chalgrove Airfield site, as this was not included within the Examination in Public held by the Inspector, and participants were advised that the viability of the site would not be discussed.

We are able to inform you that we do hold the information that you have requested. However, we rely on section 21, exemption where information is available to the applicant elsewhere.

The full text of the legislation can be found on the following link and we have quoted section 21 below for ease.
<https://www.legislation.gov.uk/ukpga/2000/36/section/21>

OFFICIAL



Date: 22 January 2021

Our Ref: RFI3258

Tel: 0300 1234 500

Email: infogov@homesengland.gov.uk

21 - Information accessible to applicant by other means.

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

Advice and Assistance

We have a duty to provide advice and assistance in accordance with Section 16 of the FOIA. As such we can advise that this information is publicly available on South Oxfordshire District Council's website:

<https://www.southoxon.gov.uk/south-oxfordshire-district-council/planning-and-development/local-plan-and-planning-policies/forthcoming-planning-policies/our-forthcoming-local-plan/independent-examination-of-our-local-plan/>.

Secondly, reference the independent viability assessment, please could you advise if there is any connection, contractual or otherwise, between the author of that report and Homes England?

We are able to confirm that Homes England does not hold the information detailed in your request. This is because FOIA does not oblige Homes England to answer general queries, only provide recorded information

In order to conclude that the information is not held, we have searched with our Development team who would have the requested information if held.

The FOIA does not oblige a public authority to create information to answer a request if the requested information is not held. The duty under section 1(1) is only to provide the recorded information held.

The full text of section 1 in the legislation can be found here:

<https://www.legislation.gov.uk/ukpga/2000/36/section/1>

Thirdly, please provide the detail of any viability assessment carried out by Homes England, and the basis upon which that viability assessment was made.

We are withholding the Viability Assessment from disclosure under the following exceptions:



Date: 22 January 2021

Our Ref: RFI3258

Tel: 0300 1234 500

Email: infogov@homesengland.gov.uk

Regulation 12(5)(e)

Under regulation 12(5)(e) of the EIR, Homes England may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

Four elements are required for Regulation 12(5)(e) to be engaged:

- 1) The information is commercial or industrial in nature;
In this case, the Viability Assessment contains financial appraisals, costings and values that relate to an ongoing commercial operation regarding prospective/potential development that is ongoing/under negotiation. Therefore it is commercial in nature as it relates to commercial activity.
- 2) Confidentiality is provided by law;
The withheld information is subject to confidentiality provided by law under a common law duty of confidence. There is no need for the public authority to have obtained the information from another or a third party for this duty to apply.
The information has a common law duty of confidence because it is not trivial and not in the public domain. The information was created in circumstances creating an obligation of confidence; it has been created internally to assist an internal decision making/approval process. Homes England therefore recognises that this information was intended to be held in confidence within the organisation.
- 3) The confidentiality is providing a legitimate economic interest;
The withheld information relates to financial appraisals of a site that is subject to development proposals. If the confidentiality of this information was breached it would harm the ability of Homes England and third parties to receive value for money for land and services at this site. There is a legitimate economic interest in protecting the ability of Homes England and third parties to negotiate in current and future commercial agreements.
- 4) The confidentiality would be adversely affected by disclosure;
Disclosure would result in third parties gaining access to commercially valuable information. Disclosure of the confidential information would harm the ability of Homes England to achieve good value for public money.

Public Interest Test

Regulation 12(5)(e) is subject to the public interest test. Once the exception has been engaged it is then necessary to consider the balance of the public interest in maintaining the exception or disclosing the information.

Under regulation 12(2) the public authority must apply a presumption in favour of disclosure, in both engaging the exception and carrying out the public interest test. In relation to engaging the exception, this means that there must be clear evidence that disclosure would have the adverse effect listed in 12(5).

Factors in favour of disclosure

- Homes England acknowledge that there is a presumption in disclosure regarding environmental information as well as a public interest in promoting transparency in how we undertake our work and allocate public money; and



Date: 22 January 2021

Our Ref: RFI3258

Tel: 0300 1234 500

Email: infogov@homesengland.gov.uk

- Homes England acknowledge that there is a public interest in plans for Chalgrove airfield.

Factors in favour of withholding

- The information relates to and directly affects ongoing commercial negotiations with land owners. If this information were released it would be likely to disadvantage Homes England's commercial position. Homes England would not be able to negotiate effectively as this information could be used by third parties to distort or otherwise prejudice the sale of land at this site. This would not be in the public interest as it would put development at risk and inflate prices. This would negatively affect public money and nullify work already undertaken;
- The information includes figures that are still under negotiation and have not yet been finalised and agreed. If this information were released it could allow third parties to undermine agreed processes and procedures and negatively affect Homes England's negotiating position with third parties. This would not be in the public interest as it would negatively affect the public purse, and put Homes England at risk of State Aid;
- Disclosure could put Homes England at risk of breach of Regulation 18 of the Public Contracts Regulations 2015. Regulation 18 provides that "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner". Homes England is a contracting authority. The information contains indicative costings for major infrastructure schemes that will be procured by Homes England. If this information were released it would be likely to prejudice future competitive tenders for works at this site. Release of the information would be likely to result in third parties being placed at a commercial disadvantage in relation to other potential bidders. There would be significant reputational, commercial and financial loss to Homes England and our partners if third parties could use the information to distort the market for their own gain;
- If the market value assumptions were in the public domain there could be expectations from the public and potential future partners about the value of the site and the value of potential works. This would mean that prices could be inflated and negotiating positions put at risk. This would not be in the public interest as it would result in poorer value for public money and could result in mis-allocation of public funds. Therefore, release would negatively affect the public purse;
- The information is still subject to approval and options contained within not yet finalised. The consequences of releasing data that is part of a wider ongoing proposal could damage our relationships with partners and put potential negotiations and planning at risk. This would not be in the public interest as this could put potential homes in jeopardy and would undermine Homes England's position and ability to deliver against its objectives and targets in our Strategic Plan;
- Releasing the information would be likely to negatively impact future development processes and proposals as interested parties may feel unable to provide all the relevant information necessary for fear of disclosure. This would impact the ability of Government officials to make effective, informed decisions regarding allocation of public funds; and
- Homes England has been unable to identify a wider public interest in disclosing the information requested.

Having considered the arguments for and against disclosure of the information, we have concluded that at this time, the balance of the public interest favours non-disclosure.



Date: 22 January 2021

Our Ref: RFI3258

Tel: 0300 1234 500

Email: infogov@homesengland.gov.uk

Regulation 12(4)(d)

Regulation 12(4)(d) of the EIR provides an exception to the duty to disclose environmental information where the material is still in the course of completion, an unfinished document or incomplete data.

The Viability Assessment engages this exception because it has not yet been formally approved by HM Treasury.

Public Interest Test

Regulation 12(4)(d) is subject to a public interest test with a presumption in favour of disclosure.

Factors in favour of disclosure

- Homes England acknowledge that there is a presumption in disclosure regarding environmental information as well as a public interest in promoting transparency in how we undertake our work and allocate public money; and
- Homes England acknowledge that there is a public interest in the information collected and compiled regarding viability at this site and that even draft documentation may be of interest to the public regarding the proposals for development at Chalgrove.

Factors in favour of withholding

- The viability appraisal has been created to be put forward to HM Treasury for their decision on investment amount at Chalgrove. Therefore this information has been created as part of the process by which Homes England reaches decisions. It is necessary that Homes England is able to have a 'safe space' in which to gather and appraise information away from public scrutiny or intervention and disclosing the information at this time would harm Homes England's 'safe space'. The decision regarding Chalgrove is due to be presented to HM Treasury imminently and disclosure would harm this decision making process. The document will be considered 'draft' until it is approved by HM Treasury. Disclosure before this time will harm the ability of HM Treasury to review the Viability Appraisal and associated Business Case independently. Release of the information could lead to lobbying that could impact the impartiality of the decision maker (or give rise to concerns on the part of others that impartiality could be adversely affected). It is essential that decision makers make decisions based on the information produced as part of the official process and also be seen to do so;
- There is also a 'chilling effect' argument regarding release of the Viability Appraisal. The chilling effect is that the information contained within the document is still under consideration and relates to ongoing discussions and approvals that are only at this stage, proposed. There is a specific need for the decision makers to have frank discussions regarding this information in order to fully and adequately appraise the information contained within. To disclose the information at this time would harm the ability of decision makers to robustly and adequately reach a decision regarding the collated information. This would not be in the public interest as it could lead to detriment to the public purse;
- There is also a 'chilling effect' argument regarding future information of a similar nature if disclosed. If the information were released it would prejudice the quality of information contained within future documents of a similar nature if those drafting thought that the information would be disclosed. This would affect the ability of decision makers to make effective, informed decisions. Any



Date: 22 January 2021

Our Ref: RFI3258

Tel: 0300 1234 500

Email: infogov@homesengland.gov.uk

decision based on incomplete information could lead to poorer outcomes which would not be in the public interest as it would not be an effective use of public money;

Having considered the arguments for and against disclosure of the information, we have concluded that at this time disclosure of the information would have an adverse effect on Homes England. The balance of the public interest favours non-disclosure.

Regulation 14(4) of the EIR states that if the exception in regulation 12(4)(d) is specified in refusal, the authority shall also specify, if known, the estimated time in which the information will be finished or completed. In compliance with this regulation, we can advise that the presentation of this information to HM Treasury is expected within the next six months, though there is currently no confirmed date.

Regulation 12(5)(b)

Regulation 12(5)(b) of the EIR provides an exception to the duty to disclose environmental information where disclosure would adversely affect the course of justice.

The Viability Assessment engages this exception because it contains information regarding a potential Compulsory Purchase Order (CPO) for Chalgrove. CPO's can be subject to challenge and review by an independent inspector at a Public Enquiry. Therefore this information could form part of a future public enquiry and disclosure at this time would harm the course of justice.

Public Interest Test

Regulation 12(5)(b) is subject to a public interest test with a presumption in favour of disclosure.

Factors in favour of disclosure

- Homes England acknowledge that there is a presumption in disclosure regarding environmental information as well as a public interest in promoting transparency in how we undertake our work and allocate public money; and
- Homes England acknowledge that there is a public interest in how justice is administered and that public bodies are accountable to public scrutiny.

Factors in favour of withholding

- Protecting the ability of a public authority's decision making powers to be subject to an inquiry or investigation is of paramount importance. Release of the information would harm the future CPO process of this site and prejudice the ability of all parties to receive an independent and lawful CPO decision. To release the information would prevent the proper administration of justice as it would harm the independence and impartiality of decision makers. This would not be in the public interest as it would cause public distrust regarding decision making over the powers of public bodies. It is imperative that public bodies follow the correct decision making processes and are seen to do so.

Having considered the arguments for and against disclosure, we have concluded that to release the information at this time would fundamentally harm the course of justice and therefore the balance of the public interest favours non-disclosure.



Date: 22 January 2021

Our Ref: RFI3258

Tel: 0300 1234 500

Email: infogov@homesengland.gov.uk

We believe that the EIR is the correct regime governing the disclosure of the Viability Assessment. However, in the interest of completeness, we have also considered how we would have treated this information if we had determined that the Freedom of Information Act 2000 (FOIA) had been more appropriate. Our findings on this issue are set out below.

Section 29 – The Economy

Under section 29(a) of the FOIA Homes England is not obliged to disclose information that would, or would be likely to, prejudice the economic interests of the United Kingdom.

The Viability Appraisal engages section 29(a) of the FOIA as its release would be likely to prejudice a regional or local economy.

Section 29 is a qualified exemption. This means that once we have decided that the exemption is engaged, Homes England must carry out a public interest test to assess whether or not it is in the wider public interest for the information to be disclosed.

Arguments in favour of disclosure:

- Homes England acknowledges there is a general public interest in promoting accountability, transparency, public understanding and involvement in how Homes England undertakes its work and how it spends public money.

Arguments in favour of withholding:

The site in question falls within South Oxfordshire, an area of England that has been categorised in its Local Plan as having a high need for investment in housing and surrounding infrastructure. There is acknowledgment in the Local Plan that this is an area of high affordability pressure and therefore that new homes and infrastructure are greatly in demand to support the increasing local population.

The proposed development would be likely to have the following effects on the local economy:

- construction at the site and related infrastructure works would employ hundreds of people over several years. This would provide opportunities for many local people and businesses;
- the proposed development includes office and business space that will support local businesses development into the future;
- the proposed development will provide significant investment in local highway infrastructure works which will support both current and future local businesses;
- the proposed development will improve access to local services, public transport and community facilities which will support current and future local businesses.

If the information were released it would be likely to prejudice delivery of the proposed development. This would not be in the public interest as it would be likely to result in the above positive economic impacts not being achieved. The development will provide investment to an area that has had little public intervention since the 1960s. Homes England's involvement in this site will support the local council in positively contributing to the local economy as a major customer, employer and investor. Disclosure would be likely to have a detrimental effect on a significant number of people and negate substantial economic improvement to the area.

Having considered the arguments for and against disclosure of the information, we have concluded that at this time, the balance of the public interest favours non-disclosure.



Date: 22 January 2021

Our Ref: RFI3258

Tel: 0300 1234 500

Email: infogov@homesengland.gov.uk

Section 43 – Commercial Interests

Under section 43(2) Homes England is not obliged to disclose information that would, or would be likely to, prejudice the commercial interests of any party.

The requested information engages section 43(2) of the FOIA as it is commercial in nature and its release would be likely to prejudice the commercial interests of Homes England and other interested parties to the information.

Homes England has identified that the information requested, if released, would be likely to prejudice proposed development at Chalgrove.

Section 43 is a qualified exemption. This means that once we have decided that the exemption is engaged, Homes England must carry out a public interest test to assess whether or not it is in the wider public interest for the information to be disclosed.

We have considered the public interest arguments for and against disclosure of the Viability Assessment in relation to the effect on the confidentiality of commercial information under Regulation 12(5)(e) above. We consider that these arguments apply equally to S43(2) and therefore that the balance of the public interest favours non-disclosure.

Section 31 – Law Enforcement

Under section 31(1)(c) Homes England is not obliged to disclose information that would, or would be likely to, prevent the administration of justice.

Homes England has identified that the requested information engages section 31(1)(c) of the FOIA as release could result in prejudice to a future public enquiry.

We have considered the public interest arguments for and against disclosure regarding the impact on the administration of justice under Regulation 12(5)(b) above. We consider that these arguments apply equally to S31(1)(c) and therefore that the balance of the public interest favours non-disclosure.

Right to Appeal

If you are not happy with the information that has been provided or the way in which your request has been handled, you may request an internal review. You can request an internal review by writing to Homes England via the details below, quoting the reference number at the top of this letter.

Email: infogov@homesengland.gov.uk

The Information Governance Team
Homes England – 6th Floor
Windsor House
50 Victoria Street
London
SW1H 0TL



Homes
England

Making homes happen

Date: 22 January 2021

Our Ref: RFI3258

Tel: 0300 1234 500

Email: infogov@homesengland.gov.uk

Your request for review must be made in writing, explain why you wish to appeal, and be received within 40 working days of the date of this response. Failure to meet this criteria may lead to your request being refused.

Upon receipt, your request for review will be passed to an independent party not involved in your original request. We aim to issue a response within 20 working days.

You may also complain to the Information Commissioner's Office (ICO) however, the Information Commissioner does usually expect the internal review procedure to be exhausted in the first instance.

The Information Commissioner's details can be found via the following link <https://ico.org.uk/>

Please note that the contents of your request and this response are also subject to the Freedom of Information Act 2000. Homes England may be required to disclose your request and our response accordingly.

Yours sincerely,

The Information Governance Team

For Homes England

OFFICIAL