



Date: 14 September 2021

Our Ref: RFI3540

Tel: 0300 1234 500

Email: infogov@homesengland.gov.uk

██████████
████████████████████
By Email Only

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

Dear ██████████

RE: Request for Information – RFI3540

Thank you for your request for information received on 19 July 2021. Your request was originally considered under the Freedom of Information Act 2000 (**FOIA**) and it has been determined that the exemption in Section 39 of the FOIA applies. Section 39 FOIA provides that Information is exempt information if the public authority holding it:

- (a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or
- (b) would be so obliged but for any exemption contained in the regulations.

Environmental information is defined in Regulation 2(1) of the Environmental Information Regulations 2004 (**EIR**). This provides that environmental information is:

“any information in written, visual, aural, electronic or any other material form on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;...”¹*

The ICO guidance advises that public authorities should interpret ‘any information on’ broadly. Information that would inform the public about matters affecting the environment or enable them to participate in decision making, and help to achieve that purpose is likely to be environmental information, even if the information itself does not directly mention the environment.

¹ Note there are further paragraphs (d) to (f) which are not set out here.



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It further advises that the test that public authorities should apply is whether the information is on or about something falling within the definitions in regulations 2(1)(a)-(f), and not whether the information directly mentions the environment or any environmental matter.

We have determined, based upon this guidance, that the information that you have requested is environmental information and therefore that the exemption is 539 FOIA does apply to it.

The exemption in Section 39 FOIA is a qualified exemption which means that we must apply the Public Interest Test to it. Having considered the ICO guidance, which provides, "... *given the fact that authorities have an obligation to respond to requests for environmental information under the EIR it is hard to envisage any circumstances where it would be in the public interest for the authority to also consider that information under FOIA*" we have therefore determined that it is not in the public interest to consider it under FOIA and rather that we should process the request in accordance with the EIR.

You requested the following information:

Medway HIF Grant Determination Agreement

1. *Whether Homes England has required or agreed specific changes to the HIF GDA;*
2. *What are the variations to the GDA and its conditions required by Homes England;*
3. *What are the changes to GDA and its conditions required by Medway Council;*
4. *Which of those conditions have been agreed between Homes England and Medway Council.*
5. *If those variations have not yet been agreed, when is it expected that they will be made.*

Response

- 1) ***Whether Homes England has required or agreed specific changes to the HIF GDA;***
&
- 2) ***What are the variations to the GDA and its conditions required by Homes England;***
&
- 3) ***What are the changes to GDA and its conditions required by Medway Council;***

We can confirm that we do hold recorded information that falls in scope of these three questions in your request, being:

- a) 4 Extension Letters to the original HIF GDA
- b) a draft version of a Deed of Variation to the GDA (DoV)

In relation to the Extension Letters, we rely on regulation 12(5)(e) of the EIR to withhold this information from disclosure:



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Regulation 12(5)(e) – Confidentiality of commercial or industrial information

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;
The information contains financial and performance milestones 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. The information has a common law duty of confidence because it is not trivial and not in the public domain. The information was created by two parties who have entered into contractually binding confidentially terms. These show that the parties had the intention that a duty of confidentiality would be created between them. Homes England therefore recognises that this information was intended to be held in confidence between the parties.
- 3) The confidentiality is providing a legitimate economic interest;
The withheld information relates to 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
- Homes England acknowledges there is an interest in the terms of the funding it delivers and the arrangements between the organisation and our partners.



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Factors in favour of withholding

- The GDA between Homes England and the Local Authority sets out performance criteria in relation to ongoing milestones and targets, delivery and operational obligations, performance criteria, and information relating to payments/repayments. To release the detail of these ongoing contractual obligations between the parties would be likely to prejudice their ability to fulfil the requirements agreed between the parties in the GDA. It is imperative that the Local Authority be able to work to achieve the obligations set out in the contract without undue influence from third parties that could disrupt the development, contracting process, or prejudice other funding sources that could put the overall scheme at risk. This would affect value for public money and prejudice new homes which would not be in line with the strategic objectives set out by government that Homes England is tasked with achieving as per our strategic plan;
- The GDA sets out requirements on the Local Authority and furthermore failure to meet the agreed deadlines could result in a material breach of contract. This would have significant cost implications on both the Local Authority and Homes England. This would directly nullify public funds already spent and would be likely to inflate the cost of future spend on the site, which would not be in the public interest as it would directly affect the public purse;
- The GDA contains confidentiality provisions in relation to the Local Authority's obligations and release of the information would breach these undertakings. This would be likely to cause significant detriment to Homes England in our relationship with a partner. As the government's housing accelerator Homes England has to support relationships with partners in order to achieve our strategic objectives and support home delivery with best value for public money. If partners felt that Homes England would reveal confidential commercial information in relation to projects where we are collaborating it would be likely that future partners would be unwilling to work with us or be wary of being open and transparent. This would cause significant risk in Homes England being able to invest public money and resources in the widest possible net of partners in order to achieve best value for money. It is imperative that Homes England are able to attract competitive partners and are respected in the market as a positive force;
- The requested information relates to a current and ongoing project where all opportunities/proposals have not yet been determined or concluded. If other potential or confirmed sources of funding became aware of the terms of the HIF funding and the obligations placed on the Local Authority regarding this funding as contained in the GDA, it would be likely to prejudice the ability of the Local Authority to negotiate for and secure other sources of funding. This would result in Homes England having to pay a higher grant than would have otherwise be the case, meaning greater cost to the public purse which would not be in the public interest;
- Releasing the information would be likely to negatively impact future funding processes and proposals to our funding schemes as potential partners may be deterred from applying to Homes England for grant funding if they felt information relating to their commercial and ongoing funding commitments would then be released to the public domain. This would be likely to result in a substantial impact on potential financial outcomes and delivery of the HIF. Furthermore, this would impact the ability of Government officials to make effective, informed decisions regarding allocation of public funds. This would not be in the public interest as public funds could be allocated in a way that would distort regional need for development;
- The consequences of releasing data at a time when negotiations/proposals are ongoing would significantly prejudice the council's ability to deliver the program. The program is a key scheme and failure to deliver could lead to significant planning harm to the local area and affect the Local Authority's ability to achieve the targets set out in their Local Plan. Therefore release would be likely to put potential homes in jeopardy and affect



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Homes England's ability to deliver against its objectives in our strategic plan, which is not in the public interest;
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.

The full text of Regulation 12(5)(e) in the legislation can be found via the following link: [The Environmental Information Regulations 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk/the-environmental-information-regulations-2004).

In relation to the draft version of the Deed of Variation, we rely on regulation 12(4)(d) of the EIR to withhold this information from disclosure:

Regulation 12(4)(d) - Material in the course of completion, unfinished documents and incomplete data

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 Deed of Variation engages this exception because it has not yet been signed. Therefore the DoV will remain a draft document until signature as terms contained within are subject to change until both parties have signed and therefore agreed the contract.

Public Interest Test

Regulation 12(4)(d) 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.

In engaging the exception it is only necessary that the information fall into the defined category, not that disclosure would have an adverse effect. However, under regulation 12(1)(b), the public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), it must apply 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 arrangements made between the organisation and third parties regarding terms of public funding and that draft documentation may be of interest to the public.

Factors in favour of withholding

- The DoV has been drafted between the parties to reflect mutually agreed conditions and milestones in relation to an ongoing project. The agreement and conditions within are not finalised nor binding until the DoV has been



Date: 14 September 2021

Our Ref: RFI3540

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signed by both parties. It is necessary that Homes England and our partners are able to have a 'safe space' in which to discuss and agree contractual terms in relation to ongoing financial obligations away from public scrutiny or intervention. Disclosure before the DoV is signed will harm the ability of the parties to review the terms and agreed clauses in the DoV in a 'safe space' and therefore independently without undue influence. Release of the information outside of the parties to the contract could lead to lobbying that could impact the impartiality of the decision maker in relation to public funds entrusted to Homes England (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 a 'chilling effect' argument regarding release of the DoV. The chilling effect is that the information contained within the DoV relates to a 'live' scheme where there are ongoing discussions and approvals. There is a specific need for the decision makers to have frank discussions regarding this information in order to fully and adequately appraise the options and financial and commercial decisions required resulting from the contract. To disclose the information at this time would harm the ability of decision makers to robustly and adequately reach decisions regarding the scheme. This would not be in the public interest as it could lead to detriment to the public purse; and
- There is also a 'chilling effect' argument regarding future information of a similar nature if disclosed. If third parties felt that they could not have frank and open discussions with Homes England regarding the terms of agreements between us they would be unwilling to have open, honest, and frank relationships with us which would be of significant detriment to our place within the market. This would prejudice the ability of Homes England to work with our partners to achieve our strategic goals as set out by Government.

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 and the third party. 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 DoV is expected to be signed within the next few months, though there is currently no confirmed date.

The full text of Regulation 12(4)(d) in the legislation can be found via the following link: [The Environmental Information Regulations 2004 \(legislation.gov.uk\)](https://legislation.gov.uk).

We do also consider that the draft DoV engages the same commercial arguments as the extension letters as outlined in regard to regulation 12(5)(e).

4. Which of those conditions have been agreed between Homes England and Medway Council.

&

5. If those variations have not yet been agreed, when is it expected that they will be made.

We can confirm that Homes England does not hold the information detailed in this part of your request.

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.



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

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

Advice and Assistance

We have a duty to provide advice and assistance in accordance with Section 16 of the FOIA. To comply with this duty we are able to confirm that any conditions discussed/drafted are not "agreed" until the DoV is signed, and therefore until this is the case the information is not held.

As per the information provided above regarding the application of Regulation 12(4)(d) we can advise that the DoV finalising the variations is expected to be signed within the next few months.

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

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