

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

### **Decision notice**

**Date:** 21 January 2014

**Public Authority:** Homes & Communities Agency

**Address:** Arpley House  
110 Birchwood Boulevard  
Birchwood  
Warrington  
WA3 7QH

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

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1. The complainant has requested a copy of an independent investigation report relating to a proposed merger between a housing group and a housing trust. The Homes & Communities Agency refused the request, citing the exemption for information provided in confidence (section 41 of the FOIA).
2. The Commissioner's decision is that the Homes & Communities Agency has correctly withheld the information under 41 of the FOIA.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 9 July 2013, the complainant wrote to the Homes & Communities Agency (HCA) and requested information in the following terms:

*"I wonder if you can send me an electronic copy of the investigation report carried out by the consultants, Altair, on behalf of Sanctuary Housing Group/the HCA into the failed merger between Chester District Housing Trust Ltd and Cosmopolitan Housing Group Ltd.*

*If you are unable to release the whole report could you let me have those parts of the report you are prepared to release, stating your reasons for withholding the redacted parts."*

5. HCA responded on 19 July 2013. It stated that it was refusing to provide the requested information, citing the exemption for information provided in confidence (section 41 of the FOIA).
6. Following an internal review HCA wrote to the complainant on 13 August 2013. It stated that it was maintaining its original decision to refuse the request.

## Scope of the case

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7. On 15 August 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would determine whether HCA had correctly withheld the requested information under section 41 of the FOIA.

## Reasons for decision

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### Section 41 – information provided in confidence

9. Section 41(1) of the FOIA states that information is exempt from disclosure 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."*

*Was the information obtained by HCA from any other person?*

10. By way of background, HCA explained to the Commissioner that the Altair Report (the "Report") was commissioned by Sanctuary Housing Group (SHG) and is a review of Chester and District Housing Trust's (CDHT) decision to merge (the merger did not take place) with Cosmopolitan Housing Group (CHG). CHG's assets and liabilities were subsequently transferred to SHG. The Report was passed to HCA by SHG as part of HCA's ongoing regulatory engagement with them.
11. HCA confirmed to the Commissioner that SHG and Altair (who were commissioned to produce the Report) are third parties, entirely separate to HCA. The Commissioner is, therefore, satisfied that the withheld information was obtained by HCA from another person.
12. The Commissioner now needs to consider whether disclosure of the Report would constitute an actionable breach of confidence.

*Does the information have the necessary quality of confidence?*

13. For the information to have the necessary quality of confidence it must not be trivial and otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.
14. Having viewed the withheld information the Commissioner notes that it relates to a commercial exercise, namely the attempted merger between CDHT and CHG. In view of the level of detail contained within the Report and the fact that, whilst there is public knowledge of the event, details of the report have not been published, the Commissioner is satisfied that the information is not trivial and that it has not been made available to the public. For these reasons the Commissioner finds that the Report has the necessary quality of confidence.

*Was the withheld information imparted in circumstances importing an obligation of confidence?*

15. HCA is the regulator of SHG as a Registered Provider (RP) of social housing and, in order to carry out its regulatory function, it requires RPs to provide it with information. HCA has explained that, whilst RPs are aware that HCA is subject to FOI they do not expect that all information will be shared as a result of it being requested, especially where both parties have taken care to keep the information confidential because of its sensitive and potentially damaging nature.

16. In this case, HCA has confirmed that, prior to being provided with the Report, SHG set out conditions for the sharing of the information. HCA was asked not to save the Report onto its logging system so as to protect it from being viewed by other members of staff. Only an extremely limited number of people at HCA have been provided with access.
17. Having viewed the relevant correspondence between HCA and SHG and considered the context, the Commissioner accepts that the Report was provided to HCA under an implied duty of confidence.

*Would an unauthorised use of the withheld information cause detriment to the confider and result in an actionable breach of confidence?*

18. HCA has argued that disclosure of the Report would cause detriment to both SHG and to itself. It explained that CHG, the subject of the proposed merger, was a non-compliant Registered Provider (RP) with governance issues, facts which have been widely reported in the media. HCA has stated that SHG currently has a good reputation within the sector and disclosure of the information could impact upon this, causing tenants, prospective tenants and other third parties to lose confidence. HCA has further argued that other investigations into the merger are ongoing and, as CHG's assets and liabilities were transferred to SHG, any commercial information contained within the Report is still relevant to SHG. Disclosure of this information, HCA has argued, would be likely to have a detrimental impact on SHG's commercial standing.
19. HCA has also explained that the Report's creation was, to an extent, dependent upon information provided by confidential sources. It would cause detriment to SHG's ability to effectively review issues if it was hindered by such sources not believing their input would be retained in confidence.
20. HCA has further argued that disclosure would also result in detriment to its own interests. As noted above, RPs are aware of HCA's obligations under the FOIA, however, disclosure of the Report would far exceed SHG's expectations as to what is shared outside of its relationship with HCA. The CHG / CDHT merger was a contentious issue and disclosure of the Report would be likely to be widely publicised. As a result, other RPs would be aware of HCA sharing information provided to it in confidence. HCA considers that this would cause serious detriment to its relationship with RPs and with the social housing sector more widely. The likely loss of cooperation would result in inhibition to HCA's ability to regulate RPs effectively.
21. In view of the likely detriment which disclosure would cause to the confider of the information (SHG), the Commissioner is satisfied that

release of the Report would be likely to give rise to an actionable breach of confidence. He has gone on to consider whether HCA would be able to invoke a public interest defence as justification for breaching confidence in this instance.

*Public interest in confidence*

22. Since Section 41 is an absolute exemption there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether HCA could successfully rely on such a public interest defence to an action for breach of confidence in this case.
23. Whereas in the case of qualified exemptions, the public interest test operates in favour of disclosure unless exceeded by the public interest in maintaining the exemption(s) applied, the reverse is the case in respect of the duty of confidence public interest test as it is assumed that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
24. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very serious public interest matters must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality.

*In favour of disclosure*

25. HCA has acknowledged that there arguments could be provided in support of breaching confidence and disclosing the Report. It has noted that disclosure of the Report would give the public an insight into CDHT's and CHG's decision to consider the merger.
26. HCA has also stated that disclosure would show that it is transparent with its regulatory activities, ensuring confidence from the public that it is making the correct decisions, gaining best value for money and performing efficiently.

27. The complainant has argued that the Report may contain evidence of serious failings and oversights in the "due diligence" process carried out by CDHG prior to the merger.
28. The complainant has argued that publication of the Report would promote public transparency over the roles of non-executive directors and boards of RPs in the processes and procedures leading up to mergers. It would also highlight any negligence or misconduct. The complainant has stated that they do not consider that disclosure would undermine the legitimate need for information to be provided in confidence or deter individuals from coming forward with sensitive information. The complainant has argued that those contributing to the Report would be senior figures in the bodies concerned and they would have understood that, given their decision-making roles, there could be no legitimate expectation of confidentiality.

*In favour of maintaining confidentiality*

29. Further to its argument (see above) that disclosure would harm its own interests, HCA has stated that, were RPs to withhold important information or refuse to provide it with information, it would find it more difficult to determine if they were complying within economic, consumer and governance standards. A lack of effective regulation could lead to bad practice and in turn the potential for substandard living conditions for tenants. HCA considers that a loss of confidence in its ability to safeguard sensitive commercial information would discourage RPs from providing it with such information, resulting in ineffective regulation of the sector.
30. The Commissioner is mindful that, in performing its role as regulator, HCA will, to an extent, be reliant on the cooperation of bodies under its jurisdiction. This cooperation is more likely to be facilitated where there is trust and where bodies are assured that information provided to regulators will only be used in relation to regulatory activities.
31. The Commissioner recognises that, since the FOIA and EIR were introduced there are no blanket grounds for withholding information and requests should be considered on a case by case basis. However, taking into consideration his own, analogous standing as regulator and the (enshrined in legislation) restrictions on disclosing information collected in this role, the Commissioner considers that the maintenance of trust and the role that confidentiality plays in this is an important and relevant principle.
32. In relation to transparency in respect of its practice as a public authority, HCA has argued that the Report is concerned with a decision between 2 RPs (one now defunct). The Report, therefore, neither

relates to HCA's decision-making nor does it reflect how it gains best value for money.

*Balance of the public interest and conclusions*

33. The Commissioner accepts that there is a general public interest in transparency in relation to the performance and practice of public authorities. However, he considers that this has to be weighed against the potential damage which disclosure in any particular instance might cause to an authority's ability to carry out its role. Where authorities rely on the cooperation of third parties in order to carry out functions and where this is facilitated by a climate of trust and the sharing of information in a confidential context, there are strong public interest grounds in not doing damage to this dynamic.
34. On the basis of submissions received from HCA the Commissioner is satisfied that SHG has not provided consent for the Report to be disclosed and that there is no evidence of illegality, misconduct or gross immorality which would warrant the disclosure of the information or which could form the basis of a public interest defence against breach of confidentiality.
35. Whilst the Commissioner notes that there is a public interest in learning more details of the facts surrounding the proposed merger, having considered the content of the Report and the weighting of the interest in maintaining confidentiality, he does not consider that the public interest is sufficiently strong to justify the disclosure of confidential information. He considers that it is very unlikely that the public interest defence would, in this case, be of sufficient strength to defend disclosure in the event that the breach resulted in legal action being taken.

## Right of appeal

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36. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

37. 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.
38. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**