

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 July 2019

Public Authority: Northern Ireland Housing Executive

Address: The Housing Centre
2 Adelaide Street
Belfast
BT2 8PB

Decision (including any steps ordered)

1. The complainant requested Options Appraisals relating to tower blocks and information on which Northern Ireland Housing Executive (NIHE) based decisions about its stock of tower blocks. NIHE withheld the Options Appraisals under section 36(2)(c)(prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that, at the time of the request, the Options Appraisals were exempt information under section 36(2)(c) of the FOIA and the public interest favoured maintaining this exemption.
3. The Commissioner does not require NIHE to take any remedial steps.

Background

4. The complainant has provided a background to his request which is broadly as described by NIHE below. He has also provided a series of arguments for disclosure which the Commissioner has considered under the public interest test section of this notice.
5. In its submission to the Commissioner NIHE has provided the following background to the request. It says the Tower Block Strategy (to which the complainant refers in his request) was approved by NIHE's Board in September 2015 and by the Minister in February 2016. The Strategy

stated that all of the tower blocks should be subjected to appraisal to determine future action on them. At its meeting in November 2016 the Board was presented with a report on the Appraisals. After due consideration the Board took the decision that NIHE should aspire to decommission all of the blocks and asked for an action plan to be brought back to the Board setting out if, how and when this could possibly be achieved.

6. Decommissioning the blocks could involve sale, transfer, demolition, redevelopment or conversion to another use. Any of these options would require the approval of NIHE's Board and the Department for Communities.
7. Following the Board's decision, NIHE officials worked on developing potential clearance and decommissioning plans for each block (or group of blocks) in line with the Board's direction. Draft plans were prepared for discussion with senior management internally and in the Department for Communities before going out to consultation with the residents of the blocks and their representatives.
8. However, as a consequence of the Grenfell Tower fire in London, further work or discussion on the draft plans had been put on hold until NIHE had time to consider any preliminary findings from the investigations into the fire and the potential implications for its own tower blocks.

Updated position

9. NIHE has gone to explain that its plans for its tower blocks have moved on since the original business cases (ie the Option Appraisals) were undertaken in 2016.
10. At its meeting in March 2019 the NIHE Board approved an Action Plan for the Tower Blocks. Given the significant funding implications for the proposed Action Plan, the Department for Communities set out the approval process to be followed for it in a letter to the Chief Executive in February 2019. In summary, following the Board's approval, the Action Plan will be submitted in the form of a Strategic Outline Case (SOC) for the Department for Communities – and, most likely, the Department of Finance's – consideration. Subject to the two Departments' endorsement of the SOC, NIHE is then required to submit up to date individual business cases to the Department for Communities for each block (or group of blocks). Departmental approval of these business cases will be then the point at which NIHE can start to implement its proposals for each block (or group of blocks).
11. The Action Plan will be published once the SOC has been approved by the two Departments and each business case will be published as it is

approved by the Departments (the intention is that these will all be prepared and submitted for approval over the next 12 months).

Request and response

12. On 21 September 2018, the complainant wrote to NIHE and requested information in the following terms:

"The NIHE has an Asset Management Strategy and a Tower Block Strategy is a sub-set of this. I would like to request copies of the Options Appraisals carried out for each of the tower blocks.

Please also include any other or ancillary information not specifically mentioned or covered above but which is plainly available and plainly directly related to the above matters, such as costings for sprinkler installation if these are not already in the appraisals. In short, any information upon which the NIHE Board and Officers based their tower block decision-making on."

13. NIHE responded on 19 October 2018. At that point NIHE said the information was exempt from release under section 22(1)(a) of the FOIA as it was intended for future publication.
14. Following an internal review NIHE wrote to the complainant on 16 November 2018. It upheld its original position.
15. As a result of the complaint to the Commissioner, NIHE reconsidered the request and revised its position. It advised the Commissioner that it had withdrawn its reliance on section 22(1)(a) and was now withholding the information under section 36(2)(c). On 30 April 2019 the Commissioner advised NIHE to communicate its new position to the complainant.

Scope of the case

16. The complainant contacted the Commissioner on 21 November 2018 to complain about the way his request for information had been handled. The complainant subsequently confirmed that the focus of his interest is the Options Appraisals. He also considers that NIHE should have considered his request under the Environmental Information Regulations (EIR) as well as the FOIA.
17. The Commissioner has first considered whether the request is for environmental information which should be handled under the EIR. She has then investigated whether, at the time of the request, NIHE could

rely on section 36(2)(c) to withhold the Options Appraisals that have been requested, and the balance of the public interest - or the EIR equivalent if appropriate.

Reasons for decision

Is the request for environmental information?

18. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulation 2(1)(a) to 2(1)(f) of the EIR.
19. Regulation 2(1)(a) defines environmental information as information that concerns the state of the elements of the environment, including: air and atmosphere, soil, landscape and natural sites and biological diversity.
20. Regulation 2(1)(c) defines environmental information as information that concerns measures (including administrative measures) such as policies, legislation, plans, programmes and activities affecting or likely to affect the elements referred to in (a) and (b) as well as measures or activities designed to protect those elements.
21. The disputed information in this case is the Options Appraisals that were drawn up as part of a review into NIHE's tower blocks. The Commissioner is satisfied that this information is too far removed from the factors under regulation 2(1)(a) and 2(1)(c) and that, as such, the Options Appraisals cannot be considered to be environmental information. The EIR therefore do not apply to this information and the Commissioner has therefore considered whether NIHE can withhold the Options Appraisals under section 36 of the FOIA.

Section 36 – prejudice to effective conduct of public affairs

22. Section 36(2)(c) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
23. Section 36(2)(c) is concerned with the effects of making the disputed information public. Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to

the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.

24. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
25. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
26. To determine, first, whether NIHE correctly applied the exemption, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - ascertain who was the qualified person or persons
 - establish that an opinion was given by the qualified person
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
27. NIHE has advised the Commissioner that its Chief Executive was the qualified person in this case. The Commissioner is satisfied that NIHE's Chief Executive is a qualified person for the purposes of section 36(5) of the FOIA.
28. From the submission NIHE provided to the Commissioner she is satisfied that the opinion that the requested information engaged the section 36(2)(c) exemption was given by the qualified person.
29. The opinion was communicated to the Commissioner on 25 April 2019 and was formed at some point between her first contact with NIHE on 5 December 2018 and 25 April 2019. It may have been formed after the Board meeting in March 2019.
30. The Commissioner has gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the *most* reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the

Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.

31. With regard to section 36(2)(c), the qualified person's opinion in this case is that prejudice *would be likely* to occur if the withheld information was to be disclosed, rather than *would* occur. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
32. In order for the qualified person's opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and argument that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
33. The qualified opinion in this case has considered the following factors in considering whether section 36(2)(c) applies to the requested information:
 - (i) There is the potential for an incorrect impression being given that the information held in the original business cases (ie Options Appraisals) relates to definite plans, rather than an investigation and feasibility work (which is now, in fact, out of date). This could inhibit or prejudice future discussions with residents on the plans and possible options for their blocks.
 - (ii) Part of the information held relates to the potential to secure rehousing sites, and public knowledge of this may inhibit or prejudice its ability to do so. NIHE has further explained to the Commissioner that releasing the Options Appraisals would put into the public domain NIHE's interest in obtaining particular sites not yet in its ownership for the construction of new social housing with which to re-house the tower block residents. It says that such public knowledge at an early stage in the process could lead to a premium being placed on the value of these sites and NIHE, or nominated housing associations, being held to ransom on acquisition prices.
 - (iii) The requested information relates to all of the tower blocks. It is highly likely that there would be considerable adverse reaction from the residents and their representatives if information on their particular blocks was provided to a resident of just one of the blocks.

- (iv) Some of the information held covers internal and external discussion on developing policy issues, and premature disclosure of sensitive information of this type into the public domain would be likely to inhibit the free and frank exchange of views for the purposes of deliberation by not allowing a free space within which staff and others are able to express themselves openly and completely and to explore all options.
 - (v) The new business cases will be the important decision-making documents in determining what NIHE does in each block. In several instances the recommendations made in these new business cases are different to those made in the original business cases/Options Appraisals (that the Board considered in 2016). NIHE contends that releasing the original Options Appraisals cases now could cause confusion in the public domain that would be likely to have a detrimental impact on its decision-making process.
 - (vi) As noted above, once the new business cases are prepared and approved they will be published and the residents informed of NIHE's plans. This task would be very difficult, and its purpose undermined, if disparate pieces of information, in this case, the original Options Appraisals, are put into the public domain.
34. The Commissioner has considered the qualified person's reasoning and has discounted the reasoning at paragraph 33(iii) and 29(iv). Information released under the FOIA is, in effect, released to the world at large. It is therefore incorrect to say that only one resident would have access to the information, albeit NIHE might consider it is obliged to proactively provide the information to all its tower block residents. The reasoning under paragraph 33(iv) meanwhile relates to the exemptions under section 36(2)(b). NIHE is not relying on section 36(2)(b)(i) or (ii) and so the Commissioner has not taken this particular argument into account.
35. The Commissioner has to consider the situation as it was at the time of the request. In this case the complainant submitted his request on 21 September 2018. NIHE advised that it is relying on section 36(2)(c) on 25 April 2019. In order for the exemption to apply, the Commissioner must find that the prejudice to the conduct of its affairs that NIHE envisions through disclosure must have been likely to occur at 21 September 2018.
36. From the background that both parties have provided, at that point in September 2018, and following the Grenfell Tower fire in June 2017, NIHE's 2016 draft plans (that is, the Options Appraisals) for its tower blocks had been put on hold. Plans for the tower blocks resumed – with an Action Plan – in March 2019.

37. Is it a reasonable opinion that releasing the 2016 tower block Options Appraisals on 21 September 2018 would have been likely to have given the wrong impression (to residents and others), frustrate future discussions with residents, frustrate NIHE's ability to secure rehousing sites, and cause confusion for residents (and others)?
38. Taking account of the reasoning NIHE has given at paragraph 33, the Commissioner is persuaded that the qualified person's opinion is a reasonable opinion to hold. The tower block programme may have been on hold at September 2018 but the Commissioner considers that it is a reasonable opinion to hold that releasing the Options Appraisals at that point would have been likely to frustrate the tower block programme when it re-started. As has been discussed, the Commissioner does not need to agree with the opinion, or find it to be the *most* reasonable opinion; it simply needs to be *an* opinion that a reasonable person could hold.
39. The Commissioner therefore finds that section 36(2)(c) is engaged as the qualified person's opinion that disclosing withheld information would be likely otherwise to prejudice the effective conduct of public affairs is a reasonable opinion.
40. The Commissioner has gone on to consider the public interest test with regard to section 36(2)(c).

Public interest test

Public interest in disclosing the information

41. In his submission to the Commissioner the complainant has said that NIHE publicly advised in 2018 that it planned to "get rid of" the tower blocks. In his view the problem is that some of the information in the published information is directly at odds with information already released in NIHE's Asset Management Strategy documents, reports and ancillary data.
42. The complainant says that the overall policy is also at odds with various aspects of both housing and other public policies and strategies. But in order to challenge government decisions the complainant says citizens need to be in possession of the full information and facts. They must have the same information the decision-makers have in order to be able to examine and question and test it.
43. Whilst acknowledging that NIHE has repeatedly stated that its plans are simply "proposals" as present and that no decision has been taken, the complainant considers that, on the ground, the proposals are already affecting the running of the blocks and are affecting tenants.

44. The complainant argues that he and the several thousand other tenants directly affected, along with the thousands more affected by the wider ramifications of this issue, have no way to properly know what is happening or to properly examine the facts and figures as they have not been made public. If the information was released the complainant considers that residents could effectively advocate for their perfectly sound homes not to be demolished or sold off unnecessarily. The complainant is concerned that NIHE will present residents with a fait accompli that residents will not be able to challenge.
45. For its part, NIHE has said that it accepts that there is a general public interest in transparency and accountability, and in understanding the reason why certain decisions were made, including the advice on which it was based.

Public interest in withholding the information

46. In its submission NIHE has referred to the reasoning it has provided at paragraph 33 as also being public interest arguments for withholding the information.

Balance of the public interest

47. The Commissioner appreciates that there are residents of the tower blocks that NIHE manages, such as the complainant in this case, that were, and are, very concerned about NIHE's plans for the blocks and the impact this might have on those residents, and others. This matter is of great interest to the residents of each tower block and, since NIHE's remit covers all of Northern Ireland, that public interest is therefore widespread.
48. However, NIHE's strategy with regard to its tower blocks had begun in 2015. This was before the Grenfell fire and the Commissioner is not aware that the tower block programme was instigated in response to any specific concerns; it appears to have been part of NIHE's normal business. If there were specific safety concerns about the tower blocks, for example, this might strengthen the case that the public interest favoured the information's release.
49. At the time of the request, work on the tower block program was suspended as a result of the Grenfell fire. Nonetheless, in the Commissioner's view the public interest was best served by the Council being able to focus on the response to the Grenfell fire and to focus on, and respond to, any effect that fire would have on the plans it had drafted. If the information had been released, addressing the resulting public concerns and fielding questions about the draft plans, which might in any case go on to be superseded as a result of the Grenfell fire

(which was in fact the case), would have diverted NIHE's resources (staff, time etc) from its tower block work, and possibly generated confusion as to what was planned for the tower blocks.

50. The Commissioner is satisfied that at the time of the request there was greater public interest in the Council being able to focus on and react to the outcome of the Grenfell Tower fire, and not to be distracted by releasing information that might become outdated. As such, the Commissioner finds that, on balance, the public interest favoured maintaining the exemption. If the complainant is still seeking the Options Appraisals, he has the option of submitting a fresh request for it to NIHE. Since the situation has moved on since 21 September 2018, it is possible that NIHE *may* no longer consider this information to be exempt information.

Right of appeal

51. 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: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

52. 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.
53. 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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