

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**  
**Decision notice**

**Date:** 13 September 2023

**Public Authority:** Northern Ireland Housing Executive  
**Address:** The Housing Centre  
2 Adelaide Street  
Belfast  
BT2 8PB

**Decision (including any steps ordered)**

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1. The complainant requested information about the housing need assessment for the Greater Shankhill area. The Northern Ireland Housing Executive (NIHE) provided the information requested. It also provided additional information relevant to the request in its internal review and also during the Commissioner's investigation. NIHE continued to withhold some information under sections 36(2)(b)(i) and (ii), and 36(2)(c) (prejudice to effective conduct of public affairs) of the FOIA and regulation 12(4)(e) of the EIR.
2. The Commissioner's decision is that NIHE has correctly applied section 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c) of the FOIA and regulation 12(4)(e) of the EIR to the request. The Commissioner does not require any steps to be taken.

**Request and response**

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3. On 18 November 2022, the complainant wrote to NIHE and requested information in the following terms:
  - "1. Confirmation that the most recent housing need assessment for the NIHE Greater Shankill District Office area indicates a housing

need for 60 new social housing units over the period 2021-2026 (10 Ainsworth/ 0 Woodvale/ Ballygomartin/ 50 Mid-Shankill).

2. If the above housing need assessment for the Greater Shankill has been updated, please provide the updated figures for the five year period 20121-2026 [sic] or any new five year period e.g. 2022 - 2027. If there has been no update, please advise when the figures will be updated.
  3. A copy of the complete housing need assessment (including all figures and calculations) that provides the basis for the 60 units figure or any updated figure.
  4. The name and location of NIHE owned sites within the NIHE Greater Shankill District Office area released by the NIHE on the open market for private housing development under development brief or sold to a housing association for private housing development, in both cases since 1st January 2010. Please also specify the date or year in which the sites were sold and if the sites were located within an Urban Renewal Area (BRA) or previously declared URA.
  5. The name and location of NIHE owned sites within the NIHE Greater Shankill District Office area the NIHE intends to release on the open market for private housing development or to be sold to a housing association for private housing development between the date on this information request and the equivalent date in 2023".
4. NIHE responded on 12 January 2023 and provided the information requested.
  5. On 16 January 2023 the complainant wrote back to NIHE and queried its responses to parts 2 and 3 of the request. In response to part 3 of the request they stated that the information provided did not show the "detailed housing need assessment calculations" for the Shankill area. In relation to part 3 of the request, the complainant also asked for the "updated housing need calculation" for the period 2022 to 2027.
  6. NIHE responded on 8 March 2023 and provided some additional information and stated that the Housing Needs Analysis (HNA) supporting data booklets were considered exempt under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOIA.
  7. On 22 March 2023 the complainant wrote back to NIHE and requested an internal review of its application of section 36 to the request.
  8. NIHE provided the outcome of its internal review on 24 April 2023 and upheld its decision that the HNA supporting data booklets were exempt

under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c). It also stated that some of the information contained within the documents was exempt under regulation 12(4)(e) of the EIR.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 9 May 2023 to complain about the way their request for information had been handled.
10. During the course of the Commissioner's investigation, NIHE disclosed some additional information contained within the HNA supporting data booklets and maintained that the remaining information was exempt under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOIA and regulation 12(4)(e) of the EIR.
11. The scope of the Commissioner's investigation is to consider NIHE's application of sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) and regulation 12(4)(e) of the EIR to the remaining information held relevant to the request.

## **Reasons for decision**

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### **Section 36 – prejudice to the effective conduct of public affairs**

12. Section 36 of the FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged, only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
13. Sections 36(2)(b)(i) and (ii) provide that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
14. In this case NIHE has applied section 36(2)(c) to all of the redactions, with the exception of environmental information which has been redacted. NIHE has also applied section 36(2)(b)(i) and/or section 36(2)(b)(ii) to parts of the withheld information.

### **Are the exemptions engaged?**

15. In order to establish whether any of the exemptions under section 36(2) have been applied correctly the Commissioner has:
  - Ascertained who is the qualified person or persons for the public authority in question;
  - Established that an opinion was given;
  - Ascertained when the opinion was given; and
  - Considered whether the opinion given was reasonable.
16. NIHE provided the Commissioner with a copy of two submissions put to its qualified person, the Chief Executive. The initial submission dated 7 March 2023 indicated that the qualified person signed their agreement to the submission which indicated that the level of prejudice claimed was the lower threshold of "would be likely". However, at the internal review stage, NIHE sought the opinion of the qualified person again and they signed their agreement on 21 April 2023 to claim the higher level of prejudice, that disclosure "would" prejudice the effective conduct of public affairs. NIHE explained that this was approved by the qualified person on the basis that it more accurately reflects the likelihood of the prejudice claimed occurring.
17. The Commissioner is satisfied that the Chief Executive is authorised as the qualified person under section 36(5) of the FOIA. The Commissioner also notes that the qualified person was provided with copies of the withheld information with the submission.
18. The Commissioner has gone on to consider whether the qualified person's opinion is reasonable. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the most reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
19. As background information, NIHE explained that the HNA "is a core document which informs a significant programme of activity across PlaceShaping, Land & Housing Analysis". It is considered essential to the development and delivery of the social housing development programme (SHDP). The budget for the SHDP is currently £185 million for the current year and therefore involves expenditure of significant public funds.

20. NIHE referred to prolonged and significant conflict and civil unrest which Northern Ireland has experienced. In broad terms this may be described as between predominantly protestant unionists and predominantly catholic nationalists. Throughout the period of conflict there have been many instances of perceived, or actual bias in the provision of public services along religious grounds. This includes the provision of housing.
21. NIHE was established in 1971 to bring equality to the provision of social housing in Northern Ireland and also to remove any actual or perceived bias in the administration, management and delivery of social housing. NIHE explained that it was "founded in statute upon fairness, equality and impartiality, with delivery of services based on objective need, not religious background". NIHE still has these core values today.
22. NIHE explained that although conflict has reduced since the Good Friday Agreement in 1998, Northern Ireland is still subject to some division along religious/community background lines. In particular, housing remains largely segregated. The figures for segregation by religion are higher than average in the Belfast area (which includes Shankill). As social housing remains so segregated, any new social housing is still often perceived to be "for" one community or the other as opposed to being new housing for any individual, regardless of their religious/community background. As a result, planning and delivery of social housing remains contentious and divisive on religious grounds. The location of any new social housing can therefore often determine the community background/religion of its occupants. NIHE provided the Commissioner with links to a number of articles which highlight the political sensitives around housing provision in Belfast.
23. The HNA is carried out in two stages. NIHE advise that stage 1 is "formula that account of numbers of applicants in housing stress, relet of properties and voids", and looks forward five years to give a project housing supply requirement. Stage 2 is a sensitivity exercise which is made up of two key elements. The first element deducts homes under construction/on site as at 31 March of the period. The second part involves "detailed engagement with Area and Regional Staff to discuss the figures, trend validity, discuss housing data and challenges specific to the housing need sector to better understand the profile of demand". This involves a process of information sharing, advice, deliberation and debate between officers before decisions are made. This process feeds in to the development of an informed, professional opinion about how matters such as turnover, change of tenancy timescales, allocations and waiting list trends might impact on housing needs trends.
24. NIHE is concerned that disclosure of the withheld information could be taken in isolation and misrepresent the level of housing need in an area, or the sensitivity analysis, which is subjective, and would be "at best

misrepresented and at worse misused". Both of these outcomes would lead to the misperception that NIHE is favouring one community/religion over another and would call into question the impartiality of NIHE. Any such misconception would go against the core values of NIHE and unfairly call into question the accuracy and validity of its housing need projections. This in turn would have a negative impact on the planning and delivery of new social housing and would also undermine many other strands of the work of NIHE. In addition, given its history, it is not possible to dismiss the potential for any perceived differential treatment to lead to further civil unrest in Northern Ireland.

25. NIHE explained that Shankhill has experienced a fairly unique past. Some of the housing areas still suffer from intimidation and on a frequent basis new households arriving in the area are made to feel unwelcome and intimidated to leave the area. On the other hand, other parts are becoming more popular and have a growing market and there are also areas where there is significant dereliction and vacant properties. NIHE are working with the community to assess redevelopment in a sustainable and balanced way. Again, NIHE has real concerns that the withheld information would be misused and/or misinterpreted, which would give rise to further tension and unease in the community.
26. In view of its role in underpinning the development of social housing, NIHE considers it to be critical that the HNA is a robust document. NIHE confirmed that the methodology for the HNA has been peer reviewed and remains robust. The robustness of the document is very much dependent on the ability of officers to engage in free, frank, and open discussion and debate of ideas, avoiding the inhibition and prejudice which NIHE considers would occur if the information was disclosed into the public domain.
27. The qualified person considers it to be of critical importance that staff are supported to discuss and debate issues and challenges in a safe space to set out sensitive issues about the locality and current circumstances around that locality. This feeds into the development of informed professional opinions about matters such as change of tenancy timescales, allocations, turnover and changes in waiting list trends which could impact on housing needs trends.
28. Using local knowledge, and expertise to interpret basic statistics on the waiting list, turnover and allocations in a way which accurately reflects local circumstances ensures that housing need is not over or under stated based solely on statistics. As an example, NIHE referred to recent civil unrest and petrol bomb attacks in estates in Newtownwards which can in turn cause a waiting list "shock", ie a reduction in individuals applying for social housing due to the disruption. If NIHE were to just

look at the waiting list figures in isolation in such cases, future housing need could be underestimated because it would not take into account those specific circumstances.

29. The qualified person contends that the risk of disclosure of the withheld information would lead to officers being less willing to express themselves freely and frankly and to offer opposing views and engage in the debate and discussion which is necessary to reach high quality decisions. This chilling effect would have a negative impact on their ability to effectively do their job, and reduce the quality of sensitivity analyses. A reduction in the quality of HNAs would have an adverse impact on the planning and development of new homes.
30. In addition, the qualified person is of the view that disclosure of information shared by community representatives and other agencies, into the public domain, would result in a reluctance from those third parties from sharing such information with NIHE in the future. This would again have a chilling effect on future information sharing and damage the quality of decision making around housing needs and future planning for new social housing.
31. Finally, the qualified person considers that there is also a risk that disclosure of the withheld information would be subject to such persistent challenge it would inhibit NIHE's decision making ability in the future. For example, it may cause delays in Housing Need support whilst any challenges are being addressed.
32. The Commissioner is satisfied that the qualified person's opinion is reasonable. With regards to sections 36(2)(b)(i) and (ii), the Commissioner accepts that it is reasonable to argue that officials need a safe space in which to engage openly to discuss issues and trends in relation to housing needs in a safe space. The Commissioner also accepts that it is reasonable to argue that the quality of advice would be impacted if officials expected that advice to be published, and it would inhibit future free and frank discussion on housing needs. With regards to section 36(2)(c), the Commissioner accepts that disclosure would cause disruption and a diversion of resources in dealing with challenges in respect of the information. The Commissioner also accepts that disclosure of the withheld information would lead to it being taken out of context, misused and/or misrepresented. This would bring into question the impartiality of NIHE and have a negative impact on its relationship with local communities. The Commissioner agrees that this can be correctly seen as 'other' prejudice to the effective conduct of public affairs.
33. The Commissioner is therefore satisfied that all three limbs of section 36(2) were engaged correctly.

### **Public interest in disclosure**

34. NIHE acknowledged the general inherent public interest in order to promote transparency and accountability as this aids the public in understanding the reasons why decisions are made, and the advice on which decisions are based.
35. NIHE also accepts that disclosure would demonstrate that it is discharging its statutory function in assessing housing needs to enable effective planning of social housing in Northern Ireland.
36. In their complaint to the Commissioner, the complainant stated that they consider there is a very strong public interest in favour of disclosure of all the information which forms the Greater Shankhill housing needs calculation and NIHE has not given sufficient weight to this in its consideration of the public interest test. They also consider that NIHE has overstated the potential negative effects of disclosure.
37. The complainant does not consider that they have "requested copies of sensitive communications or documents that help inform the creation of the housing needs assessment documents". In their complaint to the Commissioner the complainant suggested that any controversial or sensitive content could be redacted and the remainder of the documents could be disclosed.

### **Public interest arguments in favour of maintaining the exemptions**

38. NIHE's representations in relation to its public interest considerations in respect of all three limbs of section 36 are similar and there is a degree of repetition. As such, the Commissioner has identified the arguments most relevant to each limb of section 36 below.
39. In favour of maintaining sections 36(2)(b)(i) and 36(2)(b)(ii) exemptions, NIHE argued that there is a strong public interest in avoiding any inhibition to the free and frank provision of advice and exchange of views for the purpose of deliberation.
40. NIHE explained that the HNA supporting data booklet "contains information which has been built up over time and which assists in identifying supporting solutions to address housing need based on open engagement with internal colleagues and releasing this information would severely compromise our ability to do this". The HNA process involves engagement with Area and Regional Staff and the cornerstone of the work requires officials being able to have free and frank discussions and exchanges in a safe space to ensure the high quality of housing needs projections. NIHE pointed out that the subject matter to



which the withheld information relates is still live as it relates to HNA projections for the periods 2021 – 2026 and 2022 – 2027. It considers that this strengthens the need for a safe space.

41. NIHE also explained that some of the withheld information refers to advice provided by other agencies and community representatives. NIHE argues that disclosure would result in these external stakeholders being reluctant in the future to share information and views. This in turn would prejudice the effectiveness of this co-operation.
42. NIHE contends that the risk of disclosure would have a chilling effect and result in inhibition to individuals involved in the process providing free and frank advice and being less willing to express themselves completely and honestly. It would also result in individuals being less likely to offer dissenting or challenging views and engage in the necessary debate. NIHE contends that any inhibition to the free and frank provision of advice and exchange of views would impair the quality of decisions made in relation to housing need projections. It considers that there is a significant public interest in avoiding such inhibition and any resulting damage to future planning for, and supply of new social housing.
43. In relation to section 36(2)(c), NIHE considers that disclosure of the withheld information, some of which is subjective, would be taken in isolation and “would be at best misinterpreted and at worst misused”. This would lead to the standing of NIHE, and its reputation as an impartial housing authority being incorrectly called into question. Any such misconception would go against its core values and would have a significant negative impact on the planning and delivery of new housing. It would also undermine other strands of work which NIHE carries out.
44. NIHE also argues that disclosure of the withheld information “would attract such a focus and persistent challenge grounded on misconception, misunderstanding and misrepresentation of its role and function that it would detract from and inhibit the ability to take future decisions”. Dealing with the impact of disclosure in this regard would divert resources and cause disruption to NIHE’s work. For example, housing need support schemes may be delayed whilst any challenges raised are dealt with.
45. In respect of all three limbs of section 36 claimed, NIHE reiterated that the planning and development of new houses remains a politically sensitive issue. It explained that there are over 400 HNAs relating to different areas across Northern Ireland which are completed on an annual basis. Any inhibition to the process would therefore be frequent and widespread.

## **Balance of the public interest**

46. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would occur, but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
47. The Commissioner accepts there is a general public interest in openness and transparency, and in increasing the public's involvement in housing needs analyses, which in turn would increase public participation in the process and the level of public debate. He notes, however, that NIHE has disclosed a significant amount of information contained within the documents, which goes some way to satisfying the public interest in disclosure.
48. In the circumstances of this case, the Commissioner accepts that there is a need for a safe space to provide advice and exchange views, free from external comment and examination. The Commissioner considers the public interest in good decision-making by NIHE to be a compelling argument in favour of maintaining the exemption. Having considered the withheld information and the representations provided by NIHE, the Commissioner accepts that disclosure would impact on the effectiveness of the HNA process.
49. The Commissioner also considers that there is a need to protect NIHE from any negative impact on its impartiality which would result from the information being misconstrued or misrepresented. In addition, managing any challenges that would result through disclosure would divert resources and have an effect on NIHE's ability to effectively plan and deliver social housing.
50. In reaching a view on this case the Commissioner has taken into account NIHE's comments concerning the political sensitivities associated with the planning and development of new homes. He has also taken into account the fact that the HNA process is carried out annually, and as such the prejudice envisaged is likely to occur on a frequent basis. In addition, the withheld information in this case is live, as it relates to periods between 2021 and 2027.
51. The Commissioner has assessed the balance of the public interest. He has weighed the public interest in avoiding the inhibition of the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation against the public interest in openness and

transparency. His conclusion is that the public interest in avoiding this inhibition is a relevant factor and he considers that the public interest in maintaining the section 36(2)(b)(i) and (ii) exemptions outweighs the public interest in disclosure.

52. The Commissioner has also assessed the public interest in avoiding the prejudice to the effective conduct of public affairs against that in openness and transparency. His decision is that the public interest in avoiding this prejudice is a relevant factor and he considers that the public interest in maintaining the section 36(2)(c) exemption outweighs the public interest in disclosure.
53. It follows that the Commissioner finds that NIHE was entitled to rely on sections 36(2)(b)(i) and (ii) and 36(2)(c) to withhold the requested report.

### **Regulation 12(4)(e) – internal communications**

54. Regulation 12(4)(e) states that information is exempt from disclosure if it involves 'the disclosure of internal communications'. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.
55. NIHE has withheld parts of the HNA Supporting booklets under regulation 12(4)(e).
56. The Commissioner accepts that the HNA Supporting booklets constitute internal communications and he is satisfied that regulation 12(4)(e) is engaged. He has therefore gone on to consider the public interest test.

### **Public interest in favour of disclosure**

57. NIHE submitted the same public interest arguments in favour of disclosure under regulation 12(4)(e) as those it submitted in relation to section 36 of the FOIA (paragraphs 34 and 35 of this notice). NIHE also confirmed that it took into account the presumption in favour of disclosure provided by regulation 12(2).

### **Public interest in maintaining the exception**

58. NIHE pointed out that the documents in question were prepared as a means of internal communication and there was no expectation that the documents would be published. It explained that commentary relating to housing management issues in certain locations will not necessary influence the final figures for the location. However, it provides an

important local context. NIHE considers that disclosure of commentary could be taken out of context and/or misinterpreted. This would have a severe and negative impact on its reputation and standing as an impartial housing authority. It would also have a negative impact on its relationship with local communities.

59. NIHE contends that it needs a safe space in order that its officials are able to have free and frank deliberations on housing needs projections. This ensures that decisions taken on future housing supply are based on these figures.
60. NIHE argues that disclosure would have a chilling effect on the HNA process as it would inhibit officials from expressing themselves candidly and providing advice on "matters of a sensitive and evaluative nature". NIHE pointed out that the withheld information relates to live discussions which it considers adds weight to this chilling effect.
61. NIHE considers that any reduction in information sharing around housing needs projections will damage the quality of decision making and undermine future planning for, and supply of new social housing. It considers there is a strong public interest in NIHE being able to effectively discharge its primary function of planning future social housing needs.

### **Balance of the public interest**

62. The Commissioner would highlight that regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions, and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
63. The Commissioner has carefully considered the arguments both for, and against disclosure. He accepts there is a public interest in disclosure insofar as this would promote transparency and accountability of the HNA process and ultimately with regard to decisions taken by NIHE in relation to future social housing provision.
64. The Commissioner acknowledges the public interest in transparency regarding decision making about the planning processes, however, his view is that the 'safe space' and 'chilling affect' arguments made by NIHE are weighty factors in favour of maintaining the exception in this case.
65. Based on NIHE's representations the Commissioner is satisfied that disclosure would be likely to prevent officers corresponding internally with frankness and candour. This would damage the quality of advice

and may lead to poorer decision-making with regard to the future planning of social housing. This would not be in the public interest.

66. In reaching a decision in this case, the Commissioner has taken into account the fact that the withheld information in this case is live and the HNA process is one that is undertaken annually. The Commissioner has also taken into account the fact that NIHE has disclosed a significant amount of information contained within the documents, which goes some way to satisfying the public interest in disclosure.
67. Whilst the Commissioner accepts that the arguments in favour of disclosure in this case carry weight he does not consider that they outweigh the arguments in favour of withholding the information.
68. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*:  
  
"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
69. As covered above, the Commissioner has concluded that the public interest in maintaining the exception at regulation 12(4)(e) outweighs the public interest in disclosure of the information. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(e) was applied correctly.

## Right of appeal

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70. 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](mailto:grc@justice.gov.uk)

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

71. 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.

72. 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 .....**

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**