

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 October 2024

Public Authority: Ministry Of Housing, Communities & Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested target dates for completion of work to address safety issues on a specific building. The Ministry Of Housing, Communities and Local Government ("MHCLG") initially refused the request under the exemption for information provided in confidence (section 41). During the Commissioner's investigation it revised its position to rely on the exemption for health and safety (section 38).
2. The Commissioner's decision is that the exemption in section 38(1)(b) is engaged but that the public interest favours disclosing the information.
3. The Commissioner requires MHCLG to take the following steps to ensure compliance with the legislation.
 - Disclose the requested target dates to the complainant.
4. MHCLG must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 February 2024 the complainant requested the following information from MHCLG:

"The target dates stated in the contract between the government and Barratts for the remediation of [redacted]. For the avoidance of doubt any and all target dates specified."
6. MHCLG responded on 8 March 2024 and confirmed that it was withholding the information under the exemptions for health and safety (section 38) and information provided in confidence (section 41).
7. On 29 April 2024 MHCLG provided its internal review response. This confirmed that it was dropping its reliance on section 38 but maintaining its position in relation to section 41.

Scope of the case

8. On 12 May 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. During the Commissioner's investigation MHCLG initially confirmed that it was maintaining its reliance on the exemption in section 41 to withhold the requested information. It subsequently revised its position, confirming that the requested target dates did not appear in the contract identified in the request and issued a new response to the complainant confirming this. Following further correspondence MHCLG subsequently revised its position again, now confirming that target dates were held and that they were being withheld under the exemption for health and safety (section 38).
10. The Commissioner has considered whether MHCLG is entitled to withhold the requested information.

Reasons for decision

Section 38: Health and Safety

11. MHCLG confirmed that the specific limb of the exemption it is relying on to withhold the requested target dates is section 38(1)(b). This states:

“(Information is exempt information if its disclosure under this Act would, or would be likely to)-

(b) endanger the safety of any individual.”
12. For the exemption to be engaged, it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
13. The public authority must show that disclosure would or would be likely to endanger the health and safety of any individual. The effect cannot be trivial or insignificant. Endangering physical health usually means an adverse physical impact and often involves medical matters, this can relate to either individuals or a group of people. Endangering mental health implies that the disclosure of information might lead to a psychological disorder or make mental illness worse. This means that it must have a greater impact than causing upset and distress.
14. MHCLG has argued that, following advice on the risk of publicly identifying all buildings that have unsafe cladding, there are continuing concerns that this information could be used by those with malicious intent to attack or otherwise compromise the safety of affected buildings and their residents, such as through an act of arson. MHCLG has argued that, because of these concerns, it has a policy of not publicly confirming the identity of buildings which may have failed, or are inferred to have failed, cladding safety assessments, unless this information is already publicly known.
15. MHCLG has further argued that buildings will be more vulnerable during a period of remediation because the access to a site will be different, scaffolding may make other parts of the cladding system accessible, and material will be removed from the façade of the building which may expose flammable material underneath for a period of time. MHCLG has argued that it sees the consideration of this through discussions and sometimes disputes between parties regarding the increased buildings insurance premiums that will apply during the period of remediation.
16. MHCLG has acknowledged that the building identified in the request is publicly known to require remediation, but stated that this does not

represent an official confirmation of the building's cladding status. It considers that releasing target dates for completion of the work will effectively provide information about when it may be more vulnerable than it is now, and also providing information that may be used to estimate the extent of the remedial works required based on how long they are projected to take.

17. MHCLG has stated that the requested information should already be available to those connected to the building who have a legitimate interest in it, but it is not aware of it being available publicly outside of this group.
18. In support of its position MHCLG directed the Commissioner to reports of a fire at a building in Dagenham in August 2024 which happened subsequent to the request but which, in its view, demonstrates the reality of the risks identified¹. The Commissioner understands that the fire in question involved a building undergoing cladding removal.
19. The Commissioner acknowledges that MCHLG's policy is not to officially identify buildings which are at risk and that, whilst information on this regarding the specific building might be otherwise available, it does not have the same status of an official public confirmation. However, he notes that, in confirming the information is held in relation to the specific building identified, it has effectively confirmed that it is subject to remedial work.
20. Having considered the available evidence, the Commissioner acknowledges that disclosing information which would identify the building and the timeframe of its specific vulnerability would be likely to pose a real risk of physical endangerment to individuals, specifically residents of the building.
21. Given the above, the Commissioner regards the lower threshold of 'would be likely' to endanger the safety of individuals to be met and that the exemption at section 38(1)(b) is engaged.
22. The Commissioner has gone on to consider the public interest test.

¹ <https://www.london-fire.gov.uk/incidents/2024/august/flat-fire-dagenham/>

Public interest in disclosing the information

23. MHCLG has acknowledged the significant public interest in transparency with respect to building safety and it confirmed that it publishes frequent updates on work it is doing in this regard.
24. The Commissioner acknowledges that since the Grenfell fire tragedy there has been an enhanced public interest in issues concerning building safety. He considers that the findings of the Grenfell Inquiry Phase 2 report, whilst they post-date the request, provide further, retroactive reasons for transparency and accountability in this regard².
25. The complainant has stated that, as a potential resident at the property, the information would potentially provide reassurance that safety issues were being addressed. They have also stated that they have spoken with residents at the property who have advised that, contrary to MHCLG's position, they have not been able to access information on target dates.

Public interest in maintaining the exemption

26. MHCLG has argued that there is a significant public interest in ensuring the safety of individuals or groups of individuals and that disclosure of the information would be likely to endanger the safety of people resident in the building concerned.
27. MCHLG confirmed that it has engaged with the relevant owners and local authorities to seek to ensure remediation happens as swiftly as possible, and, in general, that it is ensuring that unsafe cladding is removed from the highest risk buildings
28. MHCLG also identified actions it has taken to ensure residents and leaseholders are kept informed of the progress and the status of their buildings. In MHCLG's view, these actions considerably weaken the public interest in release to the public at large.
29. MHCLG confirmed that developers are required to provide information to residents, leaseholders and other users of the building about the need for remedial works and the timescales for these to be undertaken.
30. MHCLG also referred the Commissioner to previous decision notices he has issued which have upheld its position in these matters.

² <https://www.grenfelltowerinquiry.org.uk/phase-2-report>

Balance of the public interest

31. The Commissioner will invariably place significant weight upon protecting individuals from risk to their physical and mental wellbeing. Clearly in any such situation where disclosure would be likely to lead to endangerment to health and safety, there is a public interest in avoiding that outcome. The natural consequence of this is that disclosure under FOIA will only be justified where a compelling reason can be provided to support the decision.
32. Whilst not directly officially confirmed by MHCLG, its response to the request (indirectly) confirms that remedial work is ongoing at the property. The Commissioner also notes that it is in the public domain that there are fire safety issues at the property³.
33. The Commissioner recognises that, from a basic customer service standpoint, it is arguable that residents at the property should be entitled to have access to the target dates for completion of remedial work. Although disclosures under the FOIA are global and not to a specific audience the Commissioner is mindful that MHCLG has used the accessibility of the information to residents and its more broader published updates as arguments in support of its position that due transparency in this matter has been displayed.
34. The Commissioner has received anecdotal evidence from the complainant which disputes MHCLG's narrative regarding the availability of the information to residents. However, as he does not have access to primary sources of evidence the Commissioner must suspend judgment on this point.
35. The Commissioner notes that the Grenfell Inquiry Phase 2 report highlights a number of factors that contributed to the tragedy. In addition to the failings of contractors the report identifies specific institutional failings by Government, specifically MHCLG's former incarnation as the Department for Communities and Local Government⁴.
36. As noted above, the Commissioner recognises that the report post-dates the request but he considers that, in view of the serious nature of its conclusions, it identifies a pressing need for transparency and accountability in matters that have been ongoing for years prior to the request. The Commissioner considers that there is a strong public

³ <https://www.birminghammail.co.uk/news/midlands-news/centenary-plaza-residents-face-4k-19486768>

⁴ <https://www.grenfelltowerinquiry.org.uk/news/statement-publication-phase-2-report>

interest weighting in favour of facilitating trust between the public and institutions, particularly where decisions have the potential to result in harm or loss of life.

37. The Commissioner considers that Government failings in respect of Grenfell were acknowledged by MHCLG ahead of the publication of the Phase 2 report and prior to the request⁵. He, therefore, considers that these factors would have been known to MHCLG at the time of the request and should have been factored into its consideration of the public interest test.
38. Part of the process of restoring trust involves being open about actions being taken to address the question of building safety, particularly where there are concerns about progress being made. The Commissioner notes that the Government itself has recently identified concerns about the pace of remedial work⁶. In this context, the Commissioner notes that the example of the Dagenham fire cited by MHCLG arguably highlights the public interest need for accountability around the effectiveness of public decision-making rather than to provide grounds for suppressing such information. The request, therefore, identifies a broader public interest context which is currently weighted in favour of disclosure.
39. In relation to the previous decision notices⁷ he has issued in relation to requests for similar information which have upheld MHCLG's position, the Commissioner acknowledges this, however, he is not bound by previous decisions he has made and he considers that the facts of this case are materially different to those he has previously considered.
40. In acknowledging that the exemption is engaged, the Commissioner has accepted the likelihood of disclosure of resulting in endangerment and has factored this into his balancing. In his view, releasing the target dates for completion of work, which will largely confirm what is publicly known about safety issues at the property, will not increase the risk of harm to an extent that this outweighs the public interest in transparency and accountability in this case.

⁵ <https://www.building.co.uk/legal/risk-and-responsibility-unpicking-the-first-post-grenfell-court-decisions/5121624.article>

⁶ <https://www.gov.uk/government/news/fixing-unsafe-buildings-must-be-faster-deputy-prime-minister-tells-roundtable-of-regulators-and-partners>

⁷ <https://ico.org.uk/media/action-weve-taken/decision-notice/2019/2614178/fs50759048.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024113/ic-208246-j7f2.pdf>

41. For the reasons set out above, the Commissioner considers that, in this case, the public interest in disclosure outweighs the public interest in maintaining section 38(1)(b). He, therefore, requires MCHLG to disclose the withheld information to the complainant.

Other matters

42. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.

Request handling

43. During the Commissioner's investigation MHCLG revised its initial position, which confirmed that information was held and was being withheld under exemptions, to a position which confirmed that the information was not held.
44. The grounds for changing the position from information held to not held were that the request specified target dates "...stated in the contract" and MHCLG's position was that the contract did not contain target dates. MHCLG, however, confirmed that target dates had been provided separately and so the information was held.
45. The Commissioner considers that requesters will not always know precisely where requested information is held by a public authority nor is it reasonable to assume that they should and to penalise them for this. In this case, it should have been clear to MHCLG that the complainant was seeking target dates and that, whilst their request specified the contract, the complainant would not know that the target dates they were seeking were held separate to the contract.
46. Although MHCLG subsequently remedied this the Commissioner considers that its changing position delayed the conclusion of his investigation. In future he expects MHCLG to be mindful of these factors when handling requests.

Right of appeal

47. 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

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

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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