

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 January 2019

Public Authority: Ministry of Housing, Communities and Local Government

Address: 2 Marsham Street
London SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested that the Ministry of Housing, Communities and Local Government (MHCLG) provide the names and locations of high-rise residential buildings which are recorded as having a system of cladding that does not comply with Building Regulations guidance.
2. MHCLG refused to provide the requested information, citing section 38 (health and safety) of the FOIA.
3. The Commissioner's decision is that MHCLG was not correct to have applied section 38(1)(a) of the FOIA to the withheld information, but was entitled to rely on section 38(1)(b).
4. The Commissioner does not require MHCLG to take any steps as a result of this decision notice.

Request and response

5. On 13 February 2018 the complainant wrote to MHCLG and requested information in the following terms:

'1. The names and locations of all high-rise residential developments (being individual buildings with storeys that are at least 18 metres above the ground) under the authority of the Ministry at which non-fire retardant aluminium composite materials are present in the cladding of the buildings and which, on the advice of the Ministry, do not comply with the guidance to the Building Regulations in Approved Document B 2006.'

6. MHCLG responded to the complainant on 13 March 2018. It confirmed that whilst it held information relevant to the request, it regarded this to be exempt from disclosure under section 35(1)(a) of the FOIA (which relates to the formulation of government policy).
7. MHCLG went on to advise the complainant that it had considered the public interest test but decided that, on balance, this lay in favour of withholding the information.
8. Following an internal review, MHCLG wrote to the complainant on 23 May 2018. It advised that it now accepted that its previous application of section 35(1)(a) of the FOIA was not appropriate. However, it went on to say that it was satisfied that the exemption under section 38 of the FOIA was engaged, and therefore its original decision to withhold the information requested had been correct.
9. MHCLG advised the complainant that it considered that the disclosure of the information that had been requested would *'endanger the safety of people resident in the buildings concerned; there are concerns that the names and addresses of tall buildings in residential use could be used by those with malicious intent (such as terrorists or arsonists) to attack or otherwise compromise the safety of these buildings and their residents.'*
10. MHCLG went on to confirm to the complainant that it had considered the public interest and was satisfied that this lay in favour of withholding the information in this instance.

Scope of the case

11. The complainant contacted the Commissioner on 22 June 2018 to complain about MHCLG's response to their request.
12. The Commissioner will firstly consider whether MHCLG was correct to rely on section 38(1)(a) of the FOIA, in part, or in full, when withholding all the information held relevant to the complainant's request. If necessary, she will then go on to consider whether section 38(1)(b) is engaged in relation to any of the relevant information.

Reasons for decision

Section 38-Health and Safety

13. Section 38(1) of the FOIA states that:

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

- (a) endanger the physical or mental health of any individual, or*
- (b) endanger the safety of any individual.'*

14. The Commissioner's published guidance on section 38¹ states that the use of the term 'endanger' can be interpreted as having the same meaning as 'prejudice', thereby making it appropriate to consider the prejudice test as set out in *PETA v IC and University of Oxford* EA/2009/0076².
15. However, in the more recent case of *Lownie v IC*, the National Archives and the Commonwealth Office EA/2017/0087³, the First-tier Tribunal (Tribunal) took the view that had it been the intention of Parliament for section 38 to depend upon the same 'prejudice' test as the other relevant exemptions contained within the FOIA, then it would have used the same language. It stated that attempting to assimilate the two tests of prejudice and endanger '*merely muddies the waters*' and therefore, for '*the purposes of s 38 we must apply the words of section 38, not the words of different exemptions.*'
16. The Tribunal also made it clear that the term 'would' endanger refers to something 'more likely than not' to occur (that is the probability is greater than 50%). With regard to 'would be likely to' endanger, the Tribunal stated that this is only applicable where there is a '*very significant and weighty chance*' of occurrence, such as that the occurrence '*may very well*' occur.
17. The Tribunal went on to say that a '*real risk*' is not enough to satisfy the application of the exemption and referred to a number of previous cases, including *Hogan and Oxford City Council v IC*, EA/2005/0026⁴ and

¹ <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

² http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i385/Open_Decision_0076_amended_aabbcc.pdf

³ http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2252/EA-2017-0087_Decision_2018-07-11.pdf

⁴ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

BUAV v IC and Newcastle University, EA/2010/0064⁵ as providing an appropriate explanation of the degree of likelihood that it meant by 'would be likely to' in section 38.

Section 38(1)(a)

18. In this case, MHCLG has placed the higher bar of 'would' endanger the physical or mental health of individuals, should the requested information be disclosed.
19. MHCLG has argued that if any information is released publicly without first informing affected residents, this way of disclosure may itself result in alarm and anxiety, thereby having an effect on those residents it states that it is trying best to protect.
20. MHCLG goes on to say that it is right that any communication comes through the building's owners with whom residents have a relationship, and that this is dealt with sensitively.
21. The complainant has argued that MHCLG has relied on an imagined or hypothetical risk that disclosure of the information would endanger the physical or mental health of any individual, citing a 'likelihood' of a particularised threat from persons with malicious intent. They suggest that MHCLG's conclusions are not supported by any factual evidence of the perceived likelihood and that for the exemption to be properly engaged MHCLG must demonstrate the actual presence or likelihood of such danger, which it has failed to do.
22. The Commissioner fully appreciates that, given the tragic consequences of the fire at Grenfell Tower, a significant amount of alarm, anxiety and distress will have been caused to those tenants who have become aware that they live in a building which has a similar system of cladding.
23. However, in this case, the Commissioner is only required to consider the consequence of the disclosure of the information that has been requested to the 'world at large' and whether this, in itself, 'would' cause endangerment to the physical or mental health of any individual, as claimed by MHCLG.
24. It is the Commissioner's understanding that landlords will already have notified those tenants who reside in buildings which contain cladding

⁵[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i605/\[2011\]_UKFTT\(GR C\)_EA20100064_2011-11-11.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i605/[2011]_UKFTT(GR C)_EA20100064_2011-11-11.pdf)

that does not conform to Building Regulation guidance. This is in line with government statements⁶ and the guidance published by MHCLG. Given this, the information requested, if disclosed, would not seem to reveal to residents anything that they do not already know.

25. The Commissioner also notes that some of the relevant residential tower blocks have already been identified in the media. Certain articles also include comment from a number of named residents expressing their opinions on the delays and problems relating to remediation works. The Commissioner has not been provided with any evidence that the publication of such information has directly caused endangerment to the physical or mental health of any individual.
26. The Commissioner is not satisfied that the information that has been available for her consideration in this instance is sufficient for her to be able to conclude that the disclosure of the requested information 'would', in itself, cause endangerment to the physical or mental health of any individual.
27. She has therefore gone on to consider whether the lower bar of 'would be likely' to endanger physical or mental health has been met in this instance.
28. When considering the degree of likelihood that needs to be met when applying 'would be likely' to, the Commissioner has again had regard to the case of *Lownie v IC*, the National Archives and the Commonwealth Office (previously referred to in paragraph 15 of this notice). The Tribunal commented that whilst distress can be a trigger leading to mental ill-health it did not consider that distress, in itself, should be equated with mental ill-health for the purposes of section 38. It stated that a healthy or unhealthy person may experience distress without suffering any, or additional, mental ill-health.
29. Given the above, MHCLG would need to show that endangerment to physical and mental health 'may very well occur' for section 38(1)(a) to be engaged. Evidence that there may be a 'real risk' would not be sufficient.

⁶ <https://www.gov.uk/government/news/statement-from-the-secretary-of-state-regarding-the-cladding-testing-failure-rate>

30. MHCLG has argued that the release of the requested information would cause alarm, anxiety and distress. However, it is the Commissioner's view that MHCLG has failed to provide sufficient evidence that endangerment to the mental or physical ill-health of any individual 'may very well' occur as a direct result of the disclosure of the information. She therefore has concluded that the lower bar of 'would be likely' has not been met in this instance.
31. Given the above, it is the Commissioner's view that MHCLG was not correct to have applied section 38(1)(a) to the withheld information.
32. The Commissioner has therefore gone on to consider whether section 38(1)(b) of the FOIA is engaged in respect of any of the withheld information.

Section 38(1)(b)

33. With regard to section 38(1)(b), the Commissioner has firstly considered whether, as claimed by MHCLG, the disclosure of the requested information 'would' cause endangerment to the safety of any individual.
34. MHCLG states that it believes that there is a likelihood of buildings being targeted by persons with malicious intent (such as terrorists or arsonists), should the requested information be disclosed. It goes on to say that there are concerns that the name and addresses of tall buildings in residential use could be used to attack, or otherwise compromise, the safety of these buildings and the residents. It argues that the potential harm that could be caused to residents, should this information be used in this way, is very significant and would endanger safety.
35. However, the Commissioner needs to be satisfied that the evidence available is sufficient for her to conclude that the direct disclosure of the requested information 'would' cause endangerment to safety, as argued by MHCLG.
36. The Commissioner regards it to be pertinent to note that MHCLG, when explaining the reasoning for its decision, refers to '*potential harm*' caused, that the requested information '*could be used*' and that '*there is a likelihood*' buildings would be targeted.
37. Having taken account of all the information available at this time, the Commissioner is not persuaded that this carries sufficient weight for her to conclude that it is more probable than not that endangerment to the safety of individuals 'would' be caused as a consequence of the disclosure of the information.

38. The Commissioner accepts MHCLG'S assertion that if a building included on the list requested by the complainant was targeted by an arsonist or terrorists, this would cause endangerment to the safety of residents. However, this is not what she is required to determine in this case.
39. The Commissioner needs to be satisfied that, in this instance, there is a more than a 50% chance that endangerment to the safety of an individual 'would' occur as a direct result of the disclosure of the names and addresses of the relevant buildings i.e., that there is a more than 50% chance that a building would become a target and that endangerment to safety would occur as a result.
40. The Commissioner is not convinced that the disclosure of the specific information that has been requested 'would' cause the endangerment to individuals that has been described by MHCLG.
41. As a result, the Commissioner has gone on to consider whether the lesser bar of 'would be likely to' endanger safety is applicable.
42. The Commissioner has taken into account certain statistics relating to fires in tower blocks and residential buildings. She notes that a total of 3172 deliberate fires occurred in residential dwellings in the year up to June 2018⁷, with a further 3932 deliberate fires occurring in other buildings. Fires in tower blocks increased in the year 2017-2018 with *'801 fires in residential high rises of 10 storeys or taller in 2017/18, up from 713 the year before.'*
43. The Commissioner is also aware that there are a number of media articles⁸ that have reported on various arson attacks on tower blocks since the Grenfell Tower tragedy.
44. Whilst the Commissioner accepts that the recorded statistics referred to above are not directly related to those buildings relevant to the complainant's request (that contain a particular system of cladding), she does regard it to be of some relevance to her consideration of the level of risk associated with tower blocks to deliberate fire, and whether the disclosure of information 'would be likely' to cause endangerment to the safety of any individual.

⁷https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/754340/fire-statistics-data-tables-fire0401-nov2018.xlsx

⁸ <https://www.coventrytelegraph.net/news/coventry-news/fire-bell-green-flats-coventry-1532532>

45. The Commissioner notes that purpose built low-rise flats, medium-rise flats and high-rise flats attributed to only a small amount of the total percentage (16%, 6% and 3% respectively) of primary dwelling fires that were recorded in 2017/2018⁹ (this did not include Grenfell Tower). However, she still regards it pertinent that the figures evidence that they do occur, that they are not trivial in number, and that they do endanger the safety of individuals.
46. The Commissioner is aware that the UK threat level for international terrorism¹⁰ is currently set at 'severe' and has either been at this level, or the highest level of 'critical', since August 2014. In addition, MI5 refers to varying tactics adopted by terrorist groups, including the targeting of public places with low security which contain a large group of people, and where there will be maximum casualties.
47. The Commissioner is mindful that the Grenfell Tower tragedy, its cause, and the fact that there are a significant number of other buildings that have the same, or similar, system of cladding has been well publicised both within, and outside the UK.
48. She is also aware that a number of local authorities have concerns about the consequences of making public a full list of buildings cladding similar to that of Grenfell Tower by name and address.¹¹
49. The Commissioner is of the view that a full list of properties identified by name and location, that are known to be vulnerable to the effects of a fire, would be useful intelligence and therefore likely to be of assistance to a terrorist group, or similar, should they be contemplating an attack on a residential building.
50. The Commissioner is therefore satisfied that the evidence is sufficient to conclude that there is more than just a risk of endangerment to an individual and that it 'may very well occur', should the information requested be disclosed.

⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/754457/fire-and-rescue-incident-june-2018-hosb2518.pdf

¹⁰<https://www.mi5.gov.uk/terrorist-targets>

¹¹ <https://www.propertyweek.com/insight/after-grenfell-acm-cladding-investigation/5098039.article>

51. 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.
52. The Commissioner has gone on to consider the public interest test as required by section 2(2) of the FOIA.

The public interest test

53. The test is whether *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"*.
54. The Commissioner's guidance states that, in the case of section 38, the public interest test would involve weighing up the risks to the health and safety of an individual, or group, against the public interest in disclosure in all circumstances of the case. The test must be applied on a case by case basis.

The public interest in the disclosure of information

55. The complainant has argued that MHCLG's decision has failed to properly weigh the public interest in maintaining the exemption against the public interest in the disclosure of the information. They state that it cannot be reconciled how an imagined or hypothetical threat can outweigh the actual public interest in the disclosure of the information, particularly in circumstances where the existence of this threat is (hypothetically) no more prevalent from the disclosure of the information than it is in the obvious potential targets of persons with malicious intent that are to be found in every one of the UK's cities.
56. The complainant goes on to say that the UK is saturated with buildings occupied by thousands (if not millions) of individuals on a day to day basis that present potential targets to persons with malicious intent and an imagined or hypothetical threat cannot support the outcome of the MHCLG's balancing exercise where there is obviously a genuine factual public interest in the disclosure of the information.
57. The complainant also argues that the information that has been withheld is already known to the occupants of each building, the relevant local authority, the local fire service, the MHCLG, and every other professional contractor, service provider and interested party who has been involved in the response to those buildings that contain non-fire retardant ACM following the Grenfell Tower tragedy.
58. In addition, the complainant states that the information which has been requested is, at the very least, in part, in the public domain. They suggest that, given this, the decision of the MHCLG is wrong in principle

as it prefers a 'non-existent' public interest in withholding the information against the evident public interest grounds for its disclosure.

The public interest in maintaining the exemption

59. MHCLG has advised that it accepts that there is always a degree of benefit in making information held by public authorities available as it can be expected to increase public participation in decision making and aid the transparency and accountability of government.
60. It also states that it recognises the general public interest in the Building Safety Programme which it has addressed through frequent updates on the gov.uk website¹². In addition, it has advised that it recognises that there is a considerable public interest in individuals being able to ascertain which buildings are considered, by virtue of their height, to be at greater risk of vulnerability to a fire than other residential buildings.
61. MHCLG states that the Government is following up with the owners of each of the affected buildings to ensure that residents are informed and that interim measures are in place to ensure the safety of residents, and that there is a plan for remediation and the relevant fire and rescue service has been notified. It states that, as a result, the significant public interest that owners and occupiers of these buildings and other interested parties have, has been met.
62. MHCLG has advised that it believes that, on balance, the serious risk to public safety and endangerment of lives far outweighs any public interest in releasing information which identifies all the buildings in question. It has therefore concluded that it is not in the public interest to disclose the information at this time.

The Commissioner's position

63. The Commissioner understands that there is a great deal of public interest in the issue of the cladding on buildings, particularly given the large number of buildings and individuals that have been affected by this, and the remedial measures that are being taken/not taken to make certain properties conform to Building Regulation guidance.

¹² <https://www.gov.uk/guidance/building-safety-programme>

64. However, MHCLG has confirmed that where it has been identified that a building has a system of cladding that does not conform to Building Regulation guidance, the residents have already been informed by the landlord.
65. The Commissioner is also aware that MHCLG's published 'Building Safety Programme' guidance provides detailed information and regular updates on the issue of the cladding of buildings in the UK. This includes a monthly data release¹³ which provides a substantive amount of information, including statistics for both social sector and private sector buildings that have been affected, details of the areas where they are located, the works being carried out/planned, etc.
66. The Commissioner does note that there are certain local authorities that have released information similar to that which is being requested (but which relates only to the area that they cover). In addition, certain details have also been published in media articles, both online and in magazines and newspapers.
67. The Commissioner acknowledges that where information is already in the public domain this may, in certain circumstances, increase the balance of the public interest in favour of the disclosure of the information.
68. However, the number of buildings that can be identified as having a system of cladding that does not conform to Building Regulation guidance that are already in the public domain appears to be relatively low in number.
69. The Commissioner regards there to be a substantive difference between the release of the details of a handful of properties and the disclosure of a comprehensive list of the names of all the buildings and their locations. The release of such a list would not only allow easy access to a nationwide map of relevant properties, but could also potentially be of much greater use to any group planning to target more vulnerable buildings with an intent to cause maximum harm.
70. In addition, given the extent of the information which is already in the public domain, including details of the number of buildings affected by area, the Commissioner has also had some difficulty establishing what

¹³ <https://www.gov.uk/government/publications/building-safety-programme-monthly-data-release-november-2018>

added value would be derived from the additional disclosure of the name of any building and its specific address.

71. The Commissioner has carefully considered the arguments in favour of disclosing and withholding the relevant information. However, she regards the welfare and safety of individuals to be paramount in this instance.
72. Given this, the Commissioner has concluded that, in this particular instance, at this particular point in time, the public interest weighs in favour of maintaining the exception contained within section 38(1)(b) of the FOIA.

Right of appeal

73. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

74. 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.
75. 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
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