

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

Date: 3 October 2022

Public Authority: Greater London Authority
Address: City Hall
Kamal Chunchie Way
London
E16 1ZE

Decision (including any steps ordered)

1. The complainant has requested information on an application to the Ministry of Housing, Communities and Local Government¹ Building Safety Fund.
2. The Commissioner's decision is that the information is environmental and the appropriate legislation is the Environmental Information Regulations 2004 (EIR).
3. The Commissioner's decision is that the Greater London Authority ("GLA") is not entitled to rely on regulation 12(6) to neither confirm or deny holding information in the scope of the request with respect to regulation 12(5)(a) - international relations, defence, national security or public safety.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Confirm or deny whether information falling within the scope of the request is held, and either disclose that information or issue a refusal notice compliant with regulation 14 EIR.

¹ The department changed its name to the Department for Levelling Up, Housing and Communities in September 2021

5. The public authority must take these steps within 35 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 25 November 2020, the complainant wrote to the GLA and requested information in the following terms:

"I am a leaseholder at the property above. [A named building] has undergone remedial work to replace wooden cladding and an application has been made to the Ministry of Housing Building Safety Fund. I understand that the GLA undertakes administration of applications for the GLA area.

I request a copy of information you hold regarding the above application including any correspondence between yourselves and the applicant."

7. The GLA responded on 14 December 2020. It stated that it could neither confirm or deny holding the requested information. It cited section 31(3) - Law enforcement and section 38(2) - Health and safety in its response.
8. Following an internal review the GLA wrote to the complainant on 29 January 2021 upholding its initial response.

Scope of the case

9. The complainant contacted the Commissioner on 9 February 2021 to complain about the way his request for information had been handled. He was not satisfied by the GLA's internal review following his explanation when requesting the internal review:

"I can certainly understand your withholding the information requested on the basis that 'This knowledge could be used by someone with malicious intent targeting or otherwise compromising the safety of these buildings and their residents.'

However, [a named building] has undergone the required remedial work required to allow the issue of a EWS1 certificate; copy attached."

10. The Commissioner contacted the GLA and asked it to consider whether the request should have been considered as a request for environmental information. In providing its submissions to the Commissioner the GLA

acknowledged the broad interpretation of the definition of environmental information as set out in regulation 2 of the EIR. It determined that environmental information would be contained in an application for BSF funding.

11. The Commissioner considers the scope of his investigation to be the GLA's application of FOIA section 31(3) and section 38(2) and EIR regulation 12(6) regarding regulation 12(5)(a) where a public authority may refuse information to the extent that its disclosure would adversely affect public safety.

Background

12. The Government established two cladding remediation programmes to fund the removal of Aluminium Composite Material ("ACM") from high-rise buildings: the Social Sector ACM Cladding Remediation Fund (2018) and the Private Sector ACM Cladding Remediation Fund (2019).
13. Following discovery of other types of dangerous cladding requiring remediating the Government introduced the £1bn Building Safety Fund ("BSF") in March 2020. The BSF was increased by an additional £3.5bn in February 2021.
14. The BSF is a programme through which building owners and managers can apply for funding for non-ACM cladding remediation for their building. The applicant is the building owner or manager but the funding is for the benefit of individual leaseholders who would otherwise have been charged for the remediation work.
15. The GLA administers these funds for London on behalf of the Government. All decisions about the scope and design of these programmes, along with approval or rejection of individual applications is carried out by the Department for Levelling Up, Housing and Communities ("DLUHC").
16. Initial applications to the BSF were made directly to DLUHC to determine the building's eligibility in terms of height and cladding materials. In some cases these checks have taken years to complete. Once confirmed as eligible, applicants are passed on to the GLA to complete a full funding application.
17. As the applicant for funding and the entity responsible for carrying out the work, the building owner is responsible for updating the leaseholders and residents on the progress of the funding and the work.

18. The GLA explained that there has been dissatisfaction from leaseholders and residents regarding the updates they have received from their buildings' owners. As a result leaseholders and residents have requested updates on funding directly from DLUHC. In January 2022 DLUHC created a "BSF Leaseholder and Resident Service"² which can be accessed using a unique building code given to applicants which should be shared with leaseholders and residents. This allows for monitoring progress of a building's application under the BSF.

Reasons for decision

Regulation 2(1): Is the information environmental?

19. Regulation 2(1) of the EIR defines environmental information as:

"...any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

² <https://www.building-safety-fund-status.communities.gov.uk/>

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);”

20. In considering the information requested in this case the Commissioner has referred to the Court of Appeal’s findings in *Department for Business, Energy and Industrial Strategy v Information Commissioner and Henney*³ ([2017] EWCA Civ 844).

21. The Commissioner understands that interpretation of the phrase “any information...on” will usually include information concerning, about, or relating to the measure, activity, factor, etc in question. With specific regard to regulation 2(1)(c), the Court of Appeal in *Henney* commented that:

“It follows that identifying the measure that the disputed information is “on” may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned. It may be relevant to consider the purpose for which the information was produced, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself”.

22. The Commissioner notes that the requested information concerns the funding of remediation work undertaken on a building as a result of its cladding with respect to fire safety measures. He agrees with the GLA that environmental information would be contained in an application for BSF funding.

23. As the Commissioner has previously stated⁴ in a decision notice, a measure designed to manage the risk of fire is also arguably designed to protect the state of the elements of the environment. The prevention of fire is the prevention of damage to both urban and natural landscapes, the prevention of harmful emissions and the protection of human life

³ <https://www.bailii.org/ew/cases/EWCA/Civ/2017/844.html>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2620378/ic-90850-d4p0.pdf>

and ecosystems. The Commissioner considers that built structures fall within the definition of the urban landscape.

24. The Commissioner considers that the request is for documentation which, if held, would comprise information on a measure designed to protect the elements set out in regulation 2(1)(a). He therefore finds that the request should be considered as being for environmental information in accordance with regulation 2(1)(c). The Commissioner has therefore proceeded to solely consider the exceptions applied by the GLA under EIR to neither confirm or deny the existence of the requested information.

Regulation 12(5)(a) international relations, defence, national security or public safety

Regulation 12(6) A public authority may respond neither confirming or denying holding information which would adversely affect any of the interests referred to in regulation 12(5)(a)

25. Regulation 12(5) states:

"...a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(a) international relations, defence, national security or public safety

26. Regulation 12(6) provides that a public authority can respond to a request by refusing to confirm or deny that it holds the requested information, if doing so would adversely affect international relations, defence, national security or public safety. This is often referred to as 'neither confirming nor denying' (NCND) that the information is held.
27. It is not necessary to show that both potential responses would have an adverse effect on the interests protected by regulation 12(6). It is sufficient to demonstrate that either a confirmation or a denial would have an adverse effect.
28. If a public authority is likely to receive numerous similar requests, it is an important factor to consider when relying on a NCND response.

The GLA's position

29. The GLA has applied this exception on the basis that confirmation or denial would adversely affect public safety. It explained this as the adverse effect which would result from a response that either confirmed or denied the existence of any of the requested information.
30. The Commissioner's guidance on the EIR describes public safety as:

" 'Public safety' may be interpreted widely. The exception covers information that, if disclosed, would adversely affect the ability to protect the public, public buildings and industrial sites from accident or acts of sabotage; and where disclosing information would harm the public's health and safety."

31. The GLA referenced the Commissioner's guidance noting that:

"... the exception can be used to protect the public as a whole but can also relate to potentially targeted sites or buildings, as well as to individuals."

32. The GLA added that if it were to confirm or deny that information in relation to the initial request was or was not held, the statement itself could lead to endangering the people resident in the building concerned.

33. The GLA explained that it has a long-standing position that:

"... providing any statement concerning the names and/or addresses of buildings that could potentially be perceived as being "at risk" 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."

34. Furthermore the GLA explained:

"Buildings identified as needing remedial work to replace unsuitable cladding materials can be described as considerably less safe than those with suitable cladding. If a fire was started at, or occurred at, a [sic] one of these buildings, it would be much more likely to endanger the building and the life of its occupants than in a building built to the appropriate safety standards.

While the apparent risk of an arson or terrorist attack might appear remote, the consequences to the building and its occupants are so severe that the GLA must always err on the side of caution."

35. The GLA referred the Commissioner to an article from 2018 in The Guardian,⁵ "Towers with Grenfell-style cladding at risk of arson and terrorism", which highlights these concerns and the consensus towards

⁵ <https://www.theguardian.com/uk-news/2018/mar/16/towers-with-grenfell-style-cladding-at-risk-of-arson-and-terrorism>

the potential risk of arson, terrorism and other threats towards buildings and their tenants.

36. The GLA cited the Commissioner's guidance on consistency when applying regulation 12(6).⁶ It explained its view that providing a response which confirms or denies the existence of information held concerning one building:

"...would set a precedent for the GLA, DLUHC and other public authorities in their handling of similar requests concerning other properties in the future. And while this request only concerns the BSF application for one application, over time, the responses to requests concerning other properties would provide a 'mosaic' of information which could be compiled into a list.

Over time, a consolidated list of properties would greatly increase the potential risk to buildings by making the information more readily available and 'useable' to those with ill intent. It could facilitate the targeting of at-risk buildings and arguably, in more extreme cases, encourage such criminal behaviour."

The complainant's position

37. The complainant has made their position clear, as quoted in paragraph 9. They accept the reasoning of the GLA with regard to the risks associated with buildings not having undergone remedial work. However, as they are aware that remedial work has been completed on the building in question they do not accept the GLA's argument in these circumstances. The complainant's request indicates that work has been carried out. It is therefore reasonable to assume that the public in general would observe and be aware of building work taking place.

The Commissioner's considerations

38. The Commissioner accepts that there will be occasions in relation to buildings and matters of fire safety when revealing whether the requested information is held will itself adversely affect the interests that regulation 12(5)(a) protects. However in this case the Commissioner is not persuaded that confirming or denying holding the

⁶ <https://ico.org.uk/media/for-organisations/documents/2021/2619006/12-5-a-international-relations-20203112-11.pdf>

requested information at the time of the request would adversely affect public safety. He accepts the GLA's reasoning that by revealing buildings requiring remedial work or those not requiring remedial work, motivated individuals wishing to create harm by arson would have a list of targets to attack. However, in this case it is effectively already known that work has been undertaken.

39. The circumstances of this case are that the requester is not asking for a list of buildings requiring or not requiring remedial work, nor have they asked whether the particular building required work. He requested whether the GLA held information on an application for funding from the Building Safety Fund. The range of responses which could have resulted from his request would not necessarily inform the public whether remedial work had or had not taken place as such an application may be made before the work is undertaken or retrospectively.
40. The Commissioner notes the GLA's reference to consistency when applying an NCND response to similar requests. He accepts the importance of consistency in avoiding a motivated individual piecing together information in order to deduce other information, commonly known as the 'mosaic effect'. In cases requesting information on cladding, by adopting a NCND response to all requests, the GLA avoids providing any information which would allow the deduction of vulnerable properties. However, in this case for the reasons set out in paragraphs 38 and 39, the Commissioner does not consider that by confirming or denying holding the requested information at the time of the request any 'useable' information would result. The Commissioner would also point out that his decision in one case does not set a precedent in other cases as each will be considered on the particular circumstances of that case.
41. The Commissioner notes that the GLA considers there to be a difference between information which may be common knowledge of the tenants or leaseholders of a particular building and the publication of information in the public domain. He does not disagree with this but again he must revert to the particular request which in this case states that work has been carried out, this is the premise of the request. His determination concerns the impact of responding to a request concerning the processing of an application not confirmation or denial of the state of a building. He does not consider that confirming or denying holding this information contributes to the mosaic argument set out above in paragraph 40. The Commissioner considered whether his deliberations in regard to this particular request had the potential to undermine any responses to other requests where he determined that a NCND was necessary. He decided that if requests similar to this one, regarding other buildings were made; not requests where the mosaic effect is of relevance, his conclusion would likely be the same. This is because confirming or denying holding the information does not provide

information on the state of the building (as set out in paragraph 39). Requests specifically asking for information on which buildings had or had not received remedial work would be considered differently in order to prevent the mosaic effect resulting in the deduction of vulnerable properties.

42. In conclusion, the Commissioner is not persuaded that confirming or denying whether the requested information is held would adversely affect public safety. The Commissioner therefore considers that the threshold of "would adversely affect" has not been met and the exception is not engaged.
43. The Commissioner has not considered the FOI exemptions applied to the request as he has determined that the information requested is environmental.
44. The Commissioner requires the GLA to issue a fresh response to the complainant.

Right of appeal

45. 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

46. 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.
47. 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

Susan Hughes
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